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Shifting Sands and Changing Minds: The Role of the European Parliament in the Area of Freedom, Security and Justice

Ariadna Ripoll Servent

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Contemporary European Studies

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Statement

I hereby declare that this thesis has not been and will not be, submitted in whole or in part to another University for the award of any other degree.

Signature:.....

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UNIVERSITY OF SUSSEX

DEGREE OF DOCTOR OF PHILOSOPHY IN CONTEMPORARY EUROPEAN STUDIES

SHIFTING SANDS AND CHANGING MINDS: THE ROLE OF THE EUROPEAN
PARLIAMENT IN THE AREA OF FREEDOM, SECURITY AND JUSTICESUMMARY

After the extension of the European Parliament's (EP) decision-making powers introduced by the Treaties of Amsterdam and Lisbon, it was assumed that the EP would increase the democratic credentials of the Area of Freedom, Security and Justice (AFSJ) and, given the EP's traditional promotion of civil liberties and human rights, that it would also tip the balance towards a more rights-based approach. Six years on, these expectations have not been fulfilled. The objective of this study is to evaluate why the EP, now a co-legislator, has been unable (or unwilling) to maintain its past policy preferences. In order to understand this gap between expectations and actions, the study looks at three case studies (the 'Data retention' directive, the 'Returns' directive and the SWIFT Agreement) and compares the impact that the introduction of more powers for the EP has had on these different episodes. In order to maximise the number of possible explanations, the study uses rational-choice and constructivist institutionalist approaches to identify the reasons behind the change in the policy preferences of the EP. In this sense, it aims to uncover the levels and direction of change as well as the main conditions and drivers that led to the abandonment of its previous policy positions.

Table of Contents:

Chapter 1: Introduction	1
Chapter 2: Theoretical and Methodological Framework	10
<i>Introduction</i>	<i>10</i>
2.1. <i>Meta-theoretical issues in 'new institutionalism'</i>	<i>11</i>
2.1.1. 'New institutionalism'	11
2.1.2. Ontology and epistemology	13
2.1.3. Structure and agency	15
2.1.4. Stability and change.....	17
2.2. <i>Research design</i>	<i>19</i>
2.2.1. Operationalisation	19
2.2.2. Research methods	20
<i>Conclusion</i>	<i>27</i>
Chapter 3: Setting the Context	31
<i>Introduction</i>	<i>31</i>
3.1. <i>The Area of Freedom, Security and Justice: Less intergovernmental, more securitised?</i>	<i>32</i>
3.1.1. Procedural aspects: From intergovernmentalism to communitarisation.....	33
3.1.2. Substantive aspects: Securitisation as the main rationale of the AFSJ	38
3.2. <i>The European Parliament: From 'black box' to 'normal' parliament?</i>	<i>42</i>
3.2.1. First wave of EP scholarship: a Parliament in the making.....	42
3.2.2. Looking inside the 'black box': functions and dimensions of the EP	46
<i>Conclusion</i>	<i>53</i>
Chapter 4: Co-decision in Theories.....	55
<i>Introduction</i>	<i>55</i>
4.1. <i>Decision-making procedures and patterns of behaviour: consultation and co-decision.....</i>	<i>57</i>
4.1.1. Consultation.....	57
4.1.2. Co-decision	62
4.2. <i>Models of policy preferences' change under co-decision</i>	<i>69</i>

4.2.1. Rational-choice institutionalism: a bargaining model	71
4.2.2. Constructivism: legitimising 'meta-norms' and discursive entrepreneurs	77
<i>Conclusion</i>	81
Chapter 5: The 'Data Retention' Directive.....	83
<i>Introduction</i>	83
5.1. Negotiating the 'Data retention' directive.....	84
5.2. Constructing coalitions or acting 'responsibly'?	95
5.2.1. Rationalism: constructing successful coalitions.....	95
5.2.2. Constructivism: legitimising the new patterns of behaviour	101
<i>Conclusion</i>	108
Chapter 6: The 'Returns' Directive.....	113
<i>Introduction</i>	113
6.1. Between success and failure: Negotiations on the 'Returns' directive.....	115
6.2. Constructing coalitions or acting 'responsibly'?	124
6.2.1. Rational-choice: constructing successful coalitions.....	125
6.2.2. Constructivism: legitimising the new patterns of behaviour	132
<i>Conclusion</i>	141
Chapter 7: The SWIFT Agreement.....	144
<i>Introduction</i>	144
7.1. Patterns of behaviour under the consent procedure.....	146
7.2. SWIFT: The Start of a New Age?.....	149
7.3. Constructing coalitions or acting 'responsibly'?	163
7.3.1. Rationalism: from a principled opposition to successful coalitions.....	164
7.3.2. Constructivism: from 'nuclear' power to consensual behaviour	177
<i>Conclusion</i>	188
Chapter 8: Institutional Change – Conditions and Driving Forces	193
<i>Introduction</i>	193
8.1. Conditions for change of policy preferences	194

8.1.1. Macro-structures: Procedural and substantive dimensions of change.....	195
8.1.2. Micro-behaviour: Agents and coalitions.....	204
8.2. <i>Driving forces: ‘Institutional patriotism’ and endogenous pressures.....</i>	212
8.3.1. Macro-level: ‘Institutional patriotism’ as the primary driving force of the EP ..	213
8.2.2. Micro-level: Endogenous driving forces.....	215
<i>Conclusion</i>	217
Chapter 9: Conclusions.....	221
Bibliography:.....	232
List of Interviews:.....	274
<i>Interviews:</i>	274
<i>Communications:</i>	275
Appendices:.....	276
<i>Appendix 1: Time-line of the ‘Data retention’ directive</i>	276
<i>Appendix 2: Time-line of the ‘Returns’ directive.....</i>	281
<i>Appendix 3: Time-line of the SWIFT Agreement</i>	285
<i>Appendix 4: Text of the ‘Data retention’ directive</i>	291
<i>Appendix 5: Text of the Commission’s proposal for a ‘Returns’ directive.....</i>	302
<i>Appendix 7: Text of the EP’s resolution on SWIFT (September 2009)</i>	324
<i>Appendix 8: Text of the SWIFT Agreement</i>	328

List of Figures:

Figure 4.1.: The Consultation Procedure	58
Figure 4.2.: EU Legislative Procedures	60
Figure 4.3.: The Co-operation Procedure.....	63
Figure 4.4.: The Co-decision Procedure.....	65
Figure 4.5.: Levels of Analysis.....	71
Figure 5.1.: Results of Plenary Vote	88
Figure 5.2.: Distributional Line – Traditional Preferences on Data Protection.....	95
Figure 5.3.: Distributional Line – Preferences on the ‘Data Retention’ Directive (LIBE Committee)	97
Figure 5.4.: Distributional Line – Preferences on the ‘Data Retention’ Directive (Plenary).....	98
Figure 6.1.: Results of Plenary Vote	118
Figure 6.2.: Distributional Line – Traditional Preferences on Migration	126
Figure 6.3.: Distributional Line – Preferences on the ‘Returns’ Directive (Plenary)	127
Figure 7.1.: The Consent Procedure (Ratification of International Agreements)	146
Figure 7.2.: Results of Plenary Vote	157
Figure 7.3.: Distributional Line – Preferences on the interim ‘SWIFT’ Agreement (Plenary).....	165
Figure 7.4.: Distributional Line – Preferences on the permanent ‘SWIFT’ Agreement (Plenary).....	171

List of Tables:

Table 2.1.: Case Studies	22
Table 4.1.: Patterns of Behaviour under Consultation	60
Table 4.2.: Patterns of Behaviour under Co-decision	66
Table 4.3.: Rationalist Model	72
Table 4.4.: Constructivist Model	77
Table 5.1.: Disaggregation of Votes (Data retention)	88
Table 6.1.: Disaggregation of Votes (Returns)	119
Table 7.1.: Patterns of Behaviour at the LIBE Committee	147
Table 7.2.: Disaggregation of Votes (SWIFT II)	157
Table 8.1.: Conditions for Policy Preference Change	211

List of abbreviations:

AFCO: European Parliament's committee on Constitutional Affairs
 AFET: European Parliament's committee on Foreign Affairs
 AFSJ: Area of Freedom, Security and Justice
 AGRI: European Parliament's committee on Agriculture and Rural Development
 ALDE: Alliance of Liberals and Democrats for Europe
 CATS: Article 36 Committee
 CDU: German Christian Democratic Union
 CFSP: Common Foreign and Security Policy
 CIA: Central Intelligence Agency
 COREPER: Committee of Permanent Representatives
 DG: Directorate-General
 ECHR: European Convention on Human Rights
 ECJ: European Court of Justice
 ECR: European Conservatives and Reformists
 EDPS: European Data Protection Supervisor
 EFD: Europe of Freedom and Democracy
 ENP: European Neighbourhood Policy
 ENVI: European Parliament's committee on Environment, Public Health and Food Safety
 EP: European Parliament
 EPP: European People's Party
 EPP-ED: European People's Party – European Democrats
 EU: European Union
 EUROJUST: European Union's Judicial Cooperation Unit
 EUROPOL: European Police Office
 FDP: German Free Democratic Party
 FRONTEX: European Agency for the Management of Operational Cooperation at the External Borders
 Greens/EFA: Greens – European Free Alliance group
 GUE-NGL: European United Left - Nordic Green Left
 IND/DEM: Independence/Democracy group
 JHA: Justice and Home Affairs
 JLS: Justice, Liberty and Security
 LIBE: European Parliament's committee on Civil Liberties, Justice and Home Affairs

MEP: Member of the European Parliament

MLA: Mutual Legal Assistance

NI: Non-Attached MEPs

NSA: National Security Agency

PES: Party of European Socialists

PNR: Passenger Name Record

QMV: Qualified Majority Voting

S&D: Socialists and Democrats

SCIFA: Strategic Committee on Immigration, Frontiers and Asylum

SEA: Single European Act

SEPA: Single Euro Payments Area

SWIFT: Society for Worldwide Interbank Financial Telecommunication

TCN: Third-Country National

TEC: Treaty establishing the European Community

TEU: Treaty on European Union

TFEU: Treaty on the Functioning of the European Union

TFTP: Terrorist Finance Tracking Program

TREVI: Terrorisme, Radicalisme, Extrémisme et Violence Internationale (Terrorism, Radicalism, Extremism and International Violence)

UEN: Union for Europe of the Nations

UKIP: United Kingdom Independence Party

US: United States

UST: United States Department of the Treasury

VVD: Dutch People's Party for Freedom and Democracy

Chapter 1: Introduction

“I believe there are more instances of the abridgment of the freedom of the people by gradual and silent encroachments of those in power than by violent and sudden usurpations”. James Madison¹

The debate on liberty and security has occupied political philosophers for centuries. Since Ancient Greece, the idea of liberty has been an essential element of democracy. Therefore, the possibility that a democratic society sacrifices its liberties for the sake of security is a genuine conundrum; yet, one that the European Union (EU) faces today. After years of using economic integration as a means to achieve peace and stability, the political dimension of the European project is catching up and presenting new challenges to the governance of the EU. The Area of Freedom, Security and Justice (AFSJ) is probably the best example of a policy area that started almost as an afterthought of the integration process but that has progressively built its own momentum and brought with it new dilemmas for the democratic credentials of the EU.

Born from intergovernmental origins and still closely attached to notions of ‘high politics’, such as national sovereignty and territoriality, the AFSJ is characterised for its particular tensions, both in terms of institutional set-up and substantive rationale. This policy area puts to the test the democratic and liberal origins of the European project like no other. Despite the success of the EU in avoiding new wars among its member states, the need for security has not been put to rest. In an EU without internal borders, the nature of threats and security has changed shape, but these questions are still very much present in everyday debates.

However, the emphasis put on internal security at EU level is not new; it dates back to its intergovernmental origins and the tumultuous process of slow supranationalisation. Cooperation in matters relating to terrorism and organised crime started back in the 1970s in the form of TREVI² and subsequently spilled over to the Schengen area³. Justice and

¹ Speech at the Virginia Convention to ratify the United States (US) Federal Constitution, 1788.

² An intergovernmental form of cooperation standing for ‘Terrorisme, Radicalisme, Extrémisme et Violence Internationale’.

Home Affairs (JHA) matters, as such, were only introduced in the Treaty of Maastricht in 1992⁴. The Treaty breached the uniformity of the community method by introducing two new pillars that were subject to intergovernmental decision-making. The second pillar was dedicated to the Common Foreign and Security Policy (CFSP), while the third pillar comprised a variety of internal security policies, ranging from migration to police and judicial cooperation in criminal matters.

During the core inter-governmental period (between Maastricht and Amsterdam), member states maintained their control over JHA by using unanimity in the Council of the European Union (the Council hereafter) and divesting the Commission of its power of initiative. In addition, the European Court of Justice (ECJ) had no jurisdiction over JHA legislation and the European Parliament (EP) remained an outsider, given that consultation was the main decision-making procedure in the third pillar. As a result, the Council was the sole legislator in this area; the EP could submit an opinion, but it was often ignored or only partially taken into account by the Council (Elsen 2010; Kostakopoulou 2000, 498; Peers 2006, 26). In the Treaty of Amsterdam⁵ (1997), JHA was transformed into an area of Freedom, Security and Justice. The Treaty communitarised some of the third-pillar policies, but most of these new first-pillar issues remained under a transitional half-way status that, despite offering the Commission a shared right of initiative, still ensured the continued control of member states over internal security matters.

The centrality of member states in these matters, as well as the exclusion of the EP and the ECJ, facilitated the prevalence of a policy rationale prioritising security over liberty. A first wave of securitisation developed during the 1990s, when the dismantling of borders (and a parallel increase in the number of asylum-seekers) emphasised the cross-border effects of migration and contributed to the strengthening of the external borders (Geddes

³ The Schengen Area was created in 1990 as a result of the Schengen Agreement, an international treaty signed in 1985 by the Benelux countries, France and Germany as a tool to dismantle the internal borders between the participating countries. The Schengen area comprises now all EU member states except for the United Kingdom, Ireland, Cyprus (due to the conflict with the Northern side of the island), Bulgaria and Romania (in the process of joining). Some non-EU member states are also part of Schengen, namely Iceland, Norway and Switzerland. Lichtenstein is due to implement the Agreement later in the year (European Commission 2011).

⁴ The Treaty of Maastricht entered into force in 1993.

⁵ The Treaty of Amsterdam entered into force in 1999. The five-year transitional period lasted from 1999 until 2004, when member states decided to transfer JHA matters to the normal decision-making process, starting in January 2005 (Council of the European Union 2004a).

2000). A second wave gained impetus after the 11 September 2001 terrorist attacks and the bombings in Madrid (11 March 2004) and London (7 July 2005), which reinforced the idea of a 'Fortress Europe' – on this occasion as a form of protection against new terrorist attacks (Geddes 2003). By focusing on the external nature of these threats, this second wave of securitisation linked ancillary issues, such as migration or border policies, to the fight against terrorism.

In January 2005, the end of the transitional period instituted by the Treaty of Amsterdam extended co-decision⁶ to those issues of the AFSJ falling under the first pillar⁷. This change in the decision-making procedures of the AFSJ meant that the EP could now co-legislate with the Council. The move to co-decision was received with high expectations, since the EP (and especially its committee on Civil Liberties, Justice and Home Affairs [LIBE]) had fought an uphill battle against the positions of the Council (Elsen 2010; Maurer & Parkes 2005). In general, it was understood that

“the application of the codecision procedure for these matters must be seen as a positive step (...), since the European Parliament has shown itself generally much more alive to humanitarian considerations than the Member States and their Ministers of Home Affairs, whose stance is often dictated more by a law-and-order agenda” (ALDE Group 2008, 27).

This different conception of internal security matters had led to a constant demand for more liberty-oriented policies and for a change in the direction of the AFSJ (Guiraudon 2000; Maurer & Parkes 2005). Therefore, it was expected that, with co-decision, the EP would make use of its increased powers with the aim of tipping the balance towards a more rights-based approach (Grabbe 2002; Guild & Carrera 2005).

On the other hand, it was also assumed that co-decision would break the dynamics created by unanimity in the Council – namely the absence of positive integration and the predominance of minimum standards in legislation (Lavenex & W. Wagner 2007). Therefore, it was also expected that the full inclusion of the EP in decision-making (as well

⁶ The Treaty of Lisbon now refers to 'co-decision' as the 'ordinary legislative procedure' (Article 294 on the Treaty on the Functioning of the European Union [TFEU]). The term 'co-decision' will be used throughout this project for the sake of clarity and to reflect its informal use inside the EU institutions.

⁷ Family law and regular immigration, despite being part of the first pillar, were maintained under unanimity in the Council and consultation with the EP. The third pillar was composed of police and judicial cooperation in criminal matters.

as the change to qualified majority voting [QMV] in the Council) would make it easier to legislate in this area, opening up a new forum in which to debate internal security policies. The ultimate hope was that the participation of the EP would reduce the secrecy enveloping decision-making in the AFSJ, thereby boosting the democratic credentials of the EU and increasing the level of responsiveness to its citizens' needs (Carrera & Geyer 2007; Maurer 2001).

In short, the end of the transitional period was meant to transform the AFSJ into a mainstream policy area, where the community method would prevail and increased democratisation would erase most traces of securitisation. This logic of thinking reveals the widespread assumption that, after the introduction of co-decision, the EP's policy preferences would remain stable, allowing the EU to reach a new balance between security and liberty. However, it has become increasingly apparent that these expectations have not been fulfilled, since the outcomes of legislation agreed after 2005 still prioritise security over civil liberties. This absence of change in the overall rationale of the AFSJ was not innocuous for the EP. Only four years after the end of the transitional period, Diana Wallis (British liberal Member of the European Parliament [MEP]) stated:

"we're beginning to see where the fracture lines in the house are,
(...) security is the main sticking point" (Wallis in Euractiv 2009b).

It seems that the introduction of new decision-making rules in the institutional structure of the ASFJ has had unforeseen implications for the EP. From holding clear rights-based policy preferences on internal security matters and showing a taste for institutional confrontations, the EP has now become a more divided institution – more open to the security rationale traditionally promoted by member states. In consequence, the objective of this study is to understand in what ways the introduction of new decision-making rules in the Area of Freedom, Security and Justice has changed the policy preferences of the EP.

This research question focuses primarily on processes of endogenous change; it assumes that the change in the EP's policy preferences did not occur due to external shocks but mainly as a result of the shift introduced by Treaty reforms – first with the extension of co-decision decided in the Treaty of Amsterdam and later with the further expansion of co-decision and the modifications in the consent (previous assent) procedure introduced by the Treaty of Lisbon (2007; 2009 entered into force). Therefore, it is to be expected that the

changes introduced in the decision-making rules of the EU transformed the patterns of behaviour and the motivations of the EP, which, in turn, promoted a change in the policy preferences of the institution.

In this sense, it is important to underline that the research question does not aim to examine either the extent of change in the EP's policy preferences nor its causes. The goal is neither to explain the outputs of the decision-making process; therefore, the content of each case study is only explained to the extent that it can help to understand the process of adaptation to the new institutional context. Similarly, the preferences of individual actors are examined only to the extent that they contributed to the process of change, but the process of preference formation is not the main objective of this project. The objective is to understand the process of change and the mechanisms driving this process. Therefore, the interest of this study lies rather in the understanding of how institutions affect policy preferences as well as the behaviour of actors inside the EP.

This specific focus emphasises the importance of institutional mechanisms and logics of social action. Consequently, the project is framed in 'new institutionalist' approaches; more specifically, it draws on rational-choice and constructivist understandings of 'new institutionalism' in order to explore the nature and mechanisms of change. The use of these two institutionalist approaches aims to maximise the number of possible explanations as well as to trace the different motivations behind the changes in the EP's policy preferences. On account of this research design, the project adopts an interpretative approach, allowing for alternative explanations of the same social phenomenon.

The specific focus of this study appeals to different fields of European political studies and fills three different gaps in the literature. First of all, it contributes to a better understanding of the institutional dynamics in the AFSJ. Institutions have often played a secondary role in the study of this policy area, but the role of the EP in internal security matters has been especially overlooked. The literature is characterised by being policy-oriented and quite fragmented; most analyses concentrate on specific policy issues (such as migration or counter-terrorism) as well as on the policy-making rationale. Therefore, this study aims to look at the connections between a substantive dimension of the AFSJ (the security rationale driving the process of integration) and its procedural or institutional dimension. The increased weight of the EP in the AFSJ after 2005 justifies a closer

examination of its policy preferences in internal security matters. Its new role as a co-legislator also requires a re-examination of its behaviour in inter-institutional and internal negotiations.

Second, an examination of the EP's internal workings and inter-institutional role is not just interesting for the study of the AFSJ but also for the study of the EP itself. In recent years, research on the EP has increased significantly, especially since the introduction of co-decision. However, most research has drawn on quantitative studies, mostly using formal models of decision-making to examine the EP in inter-institutional relations or roll-call votes to determine its internal political dimensions. There is therefore space for more qualitative studies of EU decision-making looking specifically at the behaviour of the EP. This type of study can offer a better understanding of the relationships between broad institutional dynamics and the behaviour of specific actors. On the other hand, it can also contribute to better understand how institutional structures shape the formulation and modification of policy preferences. In this sense, the project also contributes to the growing literature on parliamentary committees by examining the LIBE committee – generally overlooked by research on co-decision due to its long-term exclusion from effective decision-making.

Third, the use of qualitative methods and an additive research design (looking both at rationalist and constructivist explanations) go beyond the mainstream literature dealing with decision-making, which usually emphasises formal procedural aspects based on rationalist assumptions. This study develops two theoretical models in order to operationalise the research question and render the two approaches comparable. These models are a compass to guide the analysis of the three case studies and to facilitate the identification of common trends. In this sense, they are more reliant on the empirical data than traditional (game-theoretic) models of decision-making. Thereby, they have the potential to avoid the pitfalls of other models – which fail to match the experiences of practitioners and observations on the ground – while enhancing the analytical dimension of the case-study method.

The topic of this study bears, in addition, important normative implications. The role of the EP in the AFSJ appeals to two clear normative dimensions. First, despite the general assumption that researchers should approach their objects of study from an objective position, this tenet of social sciences might not be the most adequate when

looking at security. Security is not a neutral concept; writing about it, especially about what constitutes security, may have a performative effect and contribute to the securitisation of specific issues (e.g. migration) (Huysmans 2002). Therefore, in this study, I will adopt a critical understanding of security (see Huysmans 1998), which acknowledges the assumption that securitisation should not be the main rationale driving the AFSJ due to the implications it may have for the rights and liberties of EU citizens and foreigners. In this sense, I argue that the EU should have a rights-based rationale that ensures the protection not only of EU citizens but also of third-country nationals (TCNs) affected by EU policies.

The second normative dimension is closely linked to this assumption, since it relates to the implications that the active participation of the EP in the construction of the AFSJ has for democracy. The EP is the sole directly elected EU institution; its mandate is to represent the interests of European citizens. I consider that, given this representative role, the EP should have a particular interest in adopting a rights-based approach that ensures the protection of civil liberties and fundamental rights. Therefore, it is essential to evaluate the positions of the EP in such sensitive matters such as data protection, counter-terrorism or migration. These positions can contribute to shaping our societies and determining the levels of liberty enjoyed by those living on the territory of the EU. Looking back at Madison's words, if those in power can abridge freedoms by stealth, then it becomes even more important to determine whether the EP is participating in this process of gradual and silent encroachment.

The present study is organised as follows. Chapter two introduces the main theoretical approach, 'new institutionalism', as well as some key theoretical issues related to the study of institutions and change. It also presents the methodology and research design employed to investigate the research question. Chapter three presents an overview of the substantive and procedural dimensions in order to set the context for the subsequent theoretical and empirical analysis. The first section looks at the development of the AFSJ from an institutional perspective as well as at the construction of a policy rationale based on processes of securitisation. The second section presents an overview of the EP literature, from research looking at the EP as a 'black box' to the gradual investigation of its internal workings and political dimensions. Chapter four builds on this overview of the EP to construct two models of co-decision based on rationalist and constructivist approaches. The

models are then applied to the three case studies, which examine different instances of EP policy preference change.

Chapter five looks at the case of the ‘Data retention’ directive. Decided in late 2005 (just after the end of the transitional period), the directive deals with the retention of telecommunications data for the purpose of investigating and prosecuting serious crimes. Negotiated in the aftermath of the terrorist attacks in London, the outcome of the first co-decision on internal security matters raised critical voices for the wide margin of manoeuvre left to member states and the low standards of data protection. Significantly, the final compromise did not reflect the opinion of LIBE; it exposed a deal struck between the British presidency and the leaders of the socialist and conservative groups. Despite these anomalies, Chapter six shows that the change in the policy preferences of the EP can also originate in the LIBE committee. This chapter examines the ‘Returns’ directive, agreed in 2008 after three years of difficult negotiations with the Council. The directive sets common standards for the detention and return of irregularly-staying TCNs. Like in the previous case, the directive was criticised for setting low standards of protection and high degrees of flexibility for member states. In contrast, the compromise between the EP and the Council was the result of a coalition formed inside the LIBE committee between the conservatives and the liberals.

The final case study examined in Chapter seven departs slightly from the previous two. It looks at the first case of EP consent over an international agreement on internal security matters. The SWIFT Agreement⁸, dealing with the transmission of bank transfer data to the US, became the centre of attention during the course of 2010 for its turbulent ratification process. Signed by the Council one day before the entry into force of the Treaty of Lisbon (1 December 2009), the agreement failed to be ratified in a first attempt; the EP considered that it did not reach the necessary data protection standards required by EU legislation. However, after a quick renegotiation, the EP changed course and accepted a new agreement that was not essentially different from the previous one. This change in the

⁸ The official name of the agreement is “Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program”, but it became known as SWIFT agreement due to the *Society for Worldwide Interbank Financial Telecommunication* (SWIFT), the company that controls the majority of market on financial messaging data (see Chapter seven). In consequence, I will use SWIFT instead of TFTP to refer to the Agreement.

policy preferences of the EP under a decision-making procedure that is not co-decision raises questions regarding the conditions and drivers for change. These questions are discussed in Chapter eight, which offers a comparative analysis of the three case studies. Finally, Chapter nine offers some conclusions in relation to the main three contributions of this study, namely on the shape that the AFSJ has taken in the last years since the communitarisation of its policies; on the role that the EP has played in the continued securitisation of the AFSJ and why its policy preferences have shifted in the space of a few years; and, finally, on how to conceptualise this change of policy preferences from a 'new institutionalist' perspective.

Chapter 2: Theoretical and Methodological Framework

Introduction

As seen in Chapter one, the aim of this study is to understand the processes and mechanisms of change in the policy preferences of the EP. In this sense, the investigation of this research question puts special emphasis on the role of institutions (understood in a broad sense) and their capacity to influence the behaviour and motivations of actors performing inside the EP. Therefore, it is important to develop an understanding of institutions that provides one with the analytical tools to investigate the preferences of the EP and its behaviour inside the larger structure of the EU.

Studying EU institutions has become almost synonymous with dealing with one form or other of 'new institutionalism'. However, 'new institutionalism' is not a unified theoretical approach with a clearly defined object of analysis and methodology but is instead a broad church reuniting very different understandings of institutions and the social world. The aim of this chapter is not to go in depth into each strand of 'new institutionalism' but rather to use this paradigm to tackle some broader theoretical issues that affect the research design and methodology of this study.

The different variants of 'new institutionalism' have received numerous names. This has often made it more complex, since the different approaches have become connected to several meta-issues. In consequence, academic debates have tended to discuss 'new institutionalism' at the macro-level, focusing on these different theoretical issues rather than trying to compare empirical results (Jupille et al. 2003). Although the goal of this study is to 'go empirical' (Checkel & Moravcsik 2001), the issues raised by these macro debates are still relevant. The use of both rationalist and constructivist institutionalist approaches requires some considerations around issues of ontology and epistemology; structure and agency; as well as stability and change.

These meta-issues also affect the research design and methodology of the study. In consequence, this chapter first examines 'new institutionalism' as a theoretical approach and uses its main variants to justify the choices made in relation to these meta-issues. These choices will then be used to explain the research design and methods used in the study.

The second section deals more specifically with the operationalisation of the research question and the use of triangulation. In this case, triangulation combines case studies, conjunctural process tracing and elite interviews and aims to enhance the validity and reliability of qualitative data. Since elite interviews were a core source of data, the issues and challenges of using this method in this specific policy area are discussed in depth. The objective is thus to build the theoretical and methodological foundations necessary to ensure the consistency of the following chapters dealing with the operationalisation and empirical analysis.

2.1. Meta-theoretical issues in ‘new institutionalism’

2.1.1. ‘New institutionalism’

‘New institutionalism’ is a broad paradigm underlining the importance of institutions for explaining social phenomena. This core assumption appeared as a direct reaction to the behaviouralist turn of the 1950s and 1960s. Behaviouralism downplayed the importance of rules and organisations and concentrated on aggregate individual actions to explain political outcomes (Powell & DiMaggio 1991, 2). Although the ‘behaviouralist revolution’ turned the study of politics into a more analytical and rigorous practice, its basic tenets proved limited when attempting to understand processes of decision-making and the presence of stability in certain organisational environments (Shepsle 1989). Several studies on the US Congress during the 1970s revealed the necessity to ‘bring institutions back in’ (Immergut 1998; Shepsle 1989; Shepsle & Weingast 1987).

Since then, ‘new institutionalism’ has maintained that ‘institutions matter’; yet how they matter has become a bone of contention. In addition, this basic tenet is not different from the older forms of institutionalism. Consequently, the new wave of institutionalism has tried to distinguish itself from these ‘older’ forms of institutionalism. It has adopted a broader understanding of institutions (comprising more than just formal rules) and insisted on using them as explanatory variables, instead of treating them only as an object of study (March & Olsen 1984). As a result, ‘new institutionalism’ is less normative and descriptive as well as more prone to comparative analysis than its ‘older’ version (Kerremans 1996; Koelble 1995, 237; Powell & DiMaggio 1991, 2).

Despite these central assumptions, ‘new institutionalism’ has not developed as a unified theoretical approach. One of the main reasons for this eclecticism lies in the origins of the approach. The criticisms of the behaviouralist research agenda were not the product of just one single school of thought, but came from different fields of the social sciences. Principally, the institutionalist turn evolved from several legislative studies of the American Congress – embedded in the rational-choice tradition but concerned about the absence of institutions in models of decision-making – as well as from organisational studies located in political sociology (e.g. Shepsle 1989; Powell & DiMaggio 1991). These very different origins made it difficult to find a unified understanding of institutionalism, which remains split into different branches. There have been numerous attempts to categorise the multiple strands of ‘new institutionalism’. Lowndes (2010, 65), for instance, identified nine different variants. However, the majority of ‘new institutionalists’ agree on a reduced typology focusing on rational-choice; historical; and sociological (or constructivist⁹) institutionalism (e.g. Hall & Taylor 1996; Immergut 1998; Koelble 1995).

This classification is not as straightforward as it may seem. Since ‘new institutionalism’ only states that ‘institutions matter’, these different variants make reference to different understandings of ontology and epistemology; structure and agency; as well as stability and change. These different aspects are examined in more detail below. However, it is important to note that of these three variants, only rational-choice and sociological institutionalisms make an actual ontological and epistemological choice. Historical institutionalism makes a differentiation between short-term and long-term effects of institutions, focusing on path-dependency and the ability that institutions have to produce ‘lock-in’ effects (Pierson 1996) but does not make an explicit ontological choice, which has resulted in a split between rationalist and constructivist understandings of historical institutionalism (Hall & Taylor 1996; Jenson & Mérand 2010; Knill & Lenschow 2001, 189). Other forms of institutionalism have been proposed, such as discursive institutionalism (Schmidt 2008; Schmidt & Radaelli 2004); organisational institutionalism (Powell & DiMaggio 1991) or an institutionalism based on the logic of arguing (Risse 2000). Like historical institutionalism, these different propositions do not propose a distinct

⁹ For the sake of clarity, I use in this chapter the term ‘sociological’ institutionalism, since it is the most common label in the literature. However, as seen below, the use of this type of institutionalism appeals to a specific ontological choice (constructivism). Therefore, in the next chapters, I have opted for the term ‘constructivist institutionalism’ in order to render the ontological differences more clear-cut.

ontology and can thus be seen as a sub-set of some of the other ‘new institutionalisms’. Due to this ontological ambiguity, neither historical institutionalism nor any of these other variants (such as discursive institutionalism) have been taken into account for this study.

2.1.2. Ontology and epistemology

If the other variants of institutionalism discussed above are left aside, it is easier to compare the different ontological and epistemological assumptions of rational-choice and sociological institutionalism. Ontology looks at “what exists, what it looks like, what units make it up, and how these units interact with each other” (Blaikie 2007, 3). In this sense, rational-choice institutionalism adopts an ‘objectivist’ (or ‘foundationalist’) ontology. It assumes that the world is composed of discrete objects that are independent from the observer (Furlong & D. Marsh 2010, 190). This ontological position takes the form of methodological individualism (Checkel 2001b), whereby “[b]oth individual and collective actions and outcomes are explicable in terms of unit-level (individual) properties” (Jupille et al. 2003, 12). In comparison, sociological institutionalism is located in a radically different ontological dimension. It adopts a constructivist (or ‘anti-foundationalist’) ontology, which assumes that social entities do not exist as an external unit but are socially constructed through perceptions, norms and discourses of social actors (Furlong & D. Marsh 2010, 190-191). Constructivism tries to transcend the materialism embedded in most objectivist ontologies and integrate ideational factors (Blyth 2002, 2003; Schmidt 2008). It also criticises the assumption of individualism by adopting a more holistic attitude. In this sense, ideas and norms are inserted in a relationship of ‘mutual constitution’, thus not only do they constitute actors and their interests, but the latter can also change and reformulate these ideational elements (Checkel 1998; Wendt 1998).

Epistemology is understood as the “nature and scope of human knowledge, (...) what kinds of knowledge are possible, and [the] criteria for judging the adequacy of knowledge and distinguishing between scientific and non-scientific knowledge” (Blaikie 2007, 4). In this sense, the different institutionalist variants do not fit as easily in the epistemological dimension, especially sociological institutionalism. Generally, rational-choice institutionalism adopts a positivist epistemology; it aims at identifying objective trends and causal relationships (Finlayson et al. 2004, 143). Since positivism is usually linked to an objectivist ontology, it is assumed that there is only one objective explanation

of events. In comparison, sociological institutionalism has a more turbulent relationship with epistemology, adopting a range of positions between positivism and interpretivism (Checkel 1998; Christiansen et al. 1999; Wiener 2003). Interpretivism can take very different shapes but it agrees on the absence of causality given by an unstable context and fluid objects of study (Klotz & Lynch 2006, 357). Despite efforts to find a middle-ground, the main difference between both epistemological positions resides on “Big-T Truth claims” and “small-t truth claims” (Price & Reus-Smit 1998, 272) or, in other words, whether one takes the results as one objective Truth or as just one interpretation among several possible ones supported by empirical evidence (Dunn 2006; Finlayson et al. 2004; Klotz & Lynch 2006, 359; Price & Reus-Smit 1998).

The present study aims to examine the impact of decision-making rules on institutional actors. The objective is to use different understandings of institutions, actors and mechanisms for change that draw their assumptions from these two variants of ‘new institutionalism’. In consequence, the project does not adopt an *a priori* ontological position since it would be incoherent when using theoretical models drawn from rational-choice and sociological institutionalism. However, in terms of epistemology, the project is clearly situated in the interpretativist tradition (e.g. Bevir & Rhodes 2003), albeit in a ‘soft’ understanding that allows for an iterative research design and theoretical development.

In this sense, the use of two different models requires such a ‘soft’ interpretivism¹⁰. On the one hand, the use of models assumes that alternative explanations of the social world are possible and can complement each other in order to increase our understanding of social phenomena. Therefore, it seems incoherent to claim a definite truth or objective answer when using models that aim to maximise the number of possible explanations. On the other hand, despite not focusing on causality and inferences, the study still uses the language of social research (such as mechanisms and conditions) and aims to contribute to

¹⁰ Price and Reus-Smit (1998) labelled this particular understanding of epistemology as ‘modern constructivism’ or ‘critical interpretivism’ (as opposed to ‘postmodern constructivism’ based on ‘radical interpretivism’). However, both labels seem slightly misleading. ‘Modern constructivism’ does not just refer to epistemology but also to ontology and methodology. It has been used by some to identify positivist constructivists (e.g. Klotz & Lynch 2006, 357), called ‘modernist’ or ‘thin’ constructivists (Jupille et al. 2003, 15). Consequently, I prefer the use of ‘soft’, rather than ‘thin’. ‘Critical interpretivism’ seems to assume that another ‘softer’ interpretivism exists. However, ‘critical interpretivism’ is itself associated to a position of “minimal foundationalism” because it accepts some “contingent universalism” compared to more extreme positions based on deconstruction of the social world (Hoffman 1991, 170).

theory-building by using ‘contingent generalisations’, i.e. with a limited capacity to be exported to other contexts (Price & Reus-Smit 1998). Therefore a ‘soft’ interpretativist approach accepts that the answers given to the research question are one interpretation among others; the objective is to offer a narrative that reflects the best interpretation based on the available empirical data (Dunn 2006, 377; Finnemore & Sikkink 2001, 395).

2.1.3. Structure and agency

The debate around structure and agency has been central to the development of ‘new institutionalism’. After all, the idea that ‘institutions matter’ underlines the importance of structures and rebuts the exclusive attention paid by behaviouralists to agency. Institutions have become the “setting within which social, political and economic events occur and acquire meaning” (Hay 2002, 94), which has led ‘new institutionalism’ to emphasise structures rather than agents (Hay 2002, 105-107). Schmidt (2008, 313-314) underlines that the structural bias in ‘new institutionalism’ has ended up with “overly sticky” institutions and “unthinking actors”. However, the interaction between structures and agents takes different shapes depending on the variants of institutionalism. These different types of interaction are especially relevant when looking at the logics of social action, since they focus on the degree of freedom with which agents can act inside institutions (or structures) as well as their motivations to act in a given context.

Rational-choice institutionalism holds a slightly paradoxical position in this debate, since its stances on structure and agency have been the source of radically opposed interpretations. For instance, Knill and Lenschow (2001) consider that the methodological individualism of rational-choice and its focus on the micro-foundations of political processes make of it an agency-based approach. However, other authors have pointed out that, despite its emphasis on individualism, rational-choice departs from quite extreme structuralist positions (Hay 2002, 103-104; Hindmoor 2010, 54-55). Rational-choice is based on the ‘logic of consequentiality’, stating that “behaviours are driven by preferences and expectations about consequences” (March & Olsen 1989, 160). Accordingly, the essence of rational-choice is strictly structuralist: it is not the different characteristics of agents that explain their individual behaviour and actions, but the exogenous incentives provided by structures. If agents face the same choices and the same structural incentives, they will behave in exactly the same manner, i.e. they will opt for the most rational option (Hay

2002, 103-104; Hindmoor 2010, 54-55). This second interpretation, looking at the structuralist nature of rational-choice, underlines the importance to analytically separate structure and agency from the level of analysis. Rational-choice approaches may concentrate on the micro-level and the behaviour of actors, but this does not mean that agents will have freedom to choose between different options.

The relationship between structure and agency in sociological institutionalism is even more complex than in rational-choice institutionalism. Given its constructivist ontology based on the 'mutual constitution' of institutions and actors, sociological institutionalism aims to reach a middle ground in the structure-agency debate (Risse 2000, 5). It assumes that, since structures are not immutable, they can be changed by agents but, at the same time, agents' behaviours are legitimated and transformed by a given structural context. Thus, neither agents nor structures are "ontologically prior" (Klotz & Lynch 2006, 356). However, the 'logic of appropriateness' developed by constructivist approaches biases the 'intersubjective' nature of structure and agency towards structuralism (Hay 2002, 106). In the 'logic of appropriateness' "actors follow what is normatively expected of them in a particular role or situation" (Schimmelfennig & Rittberger 2006, 85). Due to the importance of norms and social structures in determining the appropriate behaviour of agents (March & Olsen 1989, 161), sociological institutionalism has focused on the macro-level; it has tried to identify what constitutes these norms and how institutions shape the context in which agents behave. In consequence, it "overemphasizes the role of social structures and norms at the expense of the agents who help create and change them in the first place" (Checkel 1998, 325).

As a result, sociological institutionalism has often neglected the second half of the 'mutual constitution' and ignored the role of agents (Jenson & Mérand 2010). Therefore, the aim of this research is to "bring agency back in" (Checkel 1998, 340) by looking not just at how institutions shape the behaviour of agents but also at how different types of agents choose different courses of action and attempt to modify the understanding and shape of institutions. The objective is to "un-stick" institutions and to introduce a more dynamic conception of preferences, rules and norms (Schmidt 2008, 313), by emphasising the role of language and discourse (Schmidt & Radaelli 2004, 192).

2.1.4. Stability and change

‘New institutionalism’ has traditionally been more interested in explaining how institutions are born and survive than in explaining institutional change (Peters & Pierre 1998). For instance, a traditional rational-choice institutionalist understanding of institutions see them as a solution to ‘collective action’ problems or as a way to reduce the ‘transaction costs’ involved in strategic action (Blyth 2003; Caporaso 2007, 401). In this sense, their definition of institutions is inherently functionalist (Hall & Taylor 1996; Olsen 2009, 6; Pollack 1996; Shepsle 1989); change only comes when the institution is unable to fulfil the functions for which it has been created (Powell & DiMaggio 1991, 4). Sociological institutionalism has also tended to concentrate on stability rather than change. As Knill and Lenschow (2001, 191) underline, this is the result of its focus of analysis (looking mostly at macro-structures) rather than its inherent conception of institutions and preferences. Therefore, change has been understood as “episodic and dramatic, responding to institutional change at the macrolevel, rather than incremental and smooth” (Powell & DiMaggio 1991, 11).

In general, the first wave of ‘new institutionalism’ tended to focus on exogenous factors as a source of institutional change (Pollack 1996, 453-454). For instance, the historical variant of ‘new institutionalism’ often equated change to ‘critical junctures’, which refer to external factors such as an economic crisis or a war (Hall & Taylor 1996, 942). Intergovernmentalist theories of EU integration are also good examples of such understandings of change; their focus on history-making episodes and treaty changes focus on periods of stability ruptured by exogenous interventions aiming to improving the functioning of EU institutions (Caporaso 2007).

In the last decade, a second wave of institutionalist research has started to examine endogenous processes of institutional change (H. Farrell & Héritier 2007b; Greif & Laitin 2004; Lieberman 2002; Olsen 2009). These studies look at internal frictions and tensions to explain changes in the structure and norms of existing institutions. In this sense, they conceive of institutions as “multiple-layered social phenomena or entities that contain rules, beliefs, and organizational elements” (Rittberger 2003, 12). This conception of institutions underlines the difficulties encountered by previous institutionalist analysis; the tendency of rational-choice institutionalism to focus on the ‘micro-level’ (i.e. on individual behaviour) and of sociological institutionalism to concentrate on the ‘macro-level’ (looking

at ideas, norms and legitimating forces) reinforces exogenous explanations for change (Rittberger 2003). This limited level of analysis (micro or macro) hides the interactions between layers and disregards internal frictions that lead to endogenous change (Lieberman 2002).

Crucially, some authors have stressed the importance of going beyond the shape and mechanisms of change in order to identify its 'directionality' as well (e.g. Howlett & Cashore 2009; Lieberman 2002; Nisbet 1972). Lieberman (2002, 703) points out that change is likely to occur "when [incentives and opportunities] point in substantially different directions, especially where they subject the same sets of actors to conflicting pressures that pose acute dilemmas and make conventional moves untenable". At the same time, once these frictions have triggered change, it is essential to observe whether changes (which can be relatively small) are cumulative (Howlett & Cashore 2009, 41). If these different incentives and opportunities reinforce one another and point towards the same direction, the probability that institutional change occurs will be higher and has better chance of success.

This second wave of institutional scholarship understands institutional change in a macro sense. It focuses on changes in the rules of the game, the levels of legitimacy or the norms of behaviour that compose organisations and political processes. This study is situated at a different level. It does not look at institutional change *per se*, but rather at the change of institutional policy preferences. The aim is to identify processes of change rather than stability (i.e. it assumes that policy preferences are not stable over time) and to understand the role of endogeneity in this process (i.e. preferences change within institutions rather than due to external shocks).

In sum, 'new institutionalism' is a broad theoretical approach regrouping very diverse understandings of essential questions in the social sciences. This first section has justified the choices made in relation to three main meta-issues. The objective is to use these choices to explain, in turn, the choice of research design and the methods used to investigate the change in the policy preferences of the EP.

2.2. Research design

Since ‘new institutionalism’ is such a broad church containing very diverse theoretical approaches, it is essential to understand how the different choices made in the first section are operationalised and examined empirically. Therefore, this section focuses on explaining how the two institutionalist approaches are operationalised in models of decision-making and why qualitative methods are the preferred methodology to obtain empirical data.

2.2.1. Operationalisation

Operationalisation is a concept at odds with an interpretivist epistemology, since it is generally equated to causality and measurement (Price & Reus-Smit 1998). However, operationalisation can be defined as the effort of researchers to “link their concepts to observational properties” (Isaak 1985, 76). In consequence, making a concept operational “is not the performing of operations so much as the more general requirement of observing reactions to given situations and defining concepts in terms of these reactions (or behaviors)” (Isaak 1985, 78). The advantage of this definition is that it is not necessarily linked to a positivist variable-based methodology but comprises other types of research design, especially the use of set theoretical models.

Theoretical models serve the purpose of ideal-types or conceptual maps that help to organise the empirical data into meaningful narratives, capable of conveying a coherent and convincing explanation. A recurrent problem with research using methods such as case studies, thick descriptions, or other qualitative research such as unstructured interviews is ‘data overload’ – that is, acquiring large quantities of data that cause the researcher to lose sight of the bigger picture and the wider contextual implications (Dunn 2006, 375). Therefore, theoretical models can help guide the research, giving an indication of what is missing in the data collected, what has to be investigated and when it is enough. In this sense, models also help to create proxies to identify the objects or mechanisms under investigation (Checkel 2006b, 367). Proxies have to be used in order to link observations to concepts, and this is more easily done through theoretical models.

In order to maximise the number of explanations, two models based on rational-choice and sociological institutionalism are developed in Chapter four. Using two

ontologically opposed theoretical approaches helps to emphasise “different logics or modes of social action and interaction that are characterized by different rationalities as far as the goals of action are concerned” (Risse 2000, 3). Therefore, the models do not seek to explain causality (i.e. what factors cause the change in policy preferences) but rather to understand the mechanisms, driving forces and conditions for change. The use of two models does not follow a purely sequential or additive logic¹¹ but focuses instead on the different levels of analysis (micro- and macro-) to underline distinct institutional effects (Knill & Lenschow 2001, 197). At the same time, the use of models helps to overcome the problem of incommensurability by setting a common object of study to the two theoretical approaches and embedding these in their own use of theoretical language and meanings, consistent with an interpretivist epistemology (Jupille et al. 2003, 18-19).

The study adopts an iterative research design, since the relationship between theory and data is both inductive and deductive rather than unidirectional. A first round of interviews was used to ‘test the waters’ and assist with the choice of case studies and the first attempts to frame the puzzle. The initial research and the information collected through these preliminary interviews pointed towards the use of ‘new institutionalism’. Further research on theoretical, institutional and policy-oriented literature helped to build the two models of co-decision and policy preference change. These two models were then applied to the two case studies selected from the first round of interviews and adapted for the third case study, which occurred afterwards and is not a co-decision case. In total, the empirical information was gathered in five rounds of interviews, conducted in January 2009; November-December 2009; March 2010; July 2010; and March 2011. The empirical analysis of the three case studies was used inductively to define wider conditions and drivers for change. This comparative analysis is used to generalise as well as reflect upon the theoretical discussions developed in this chapter.

2.2.2. Research methods

Ideally, research methods should derive from the nature of the research question in order to provide data and tools of analysis that help to answer this question (Grix 2001, 29).

¹¹ A sequential logic is a two-step process where one ontological perspective is used to refine the other one, which keeps its explanatory superiority. An additive logic (or domain of application logic) tries to use both logics to explain human behaviour, which can end in high explanatory indeterminacy (Jupille et al. 2003; Knill & Lenschow 2001, 191).

Since the objective of the project is to trace processes and understand events in specific settings (Grix 2001, 33), qualitative research seems better suited to gather data that can be subjected to interpretation and analysis. In this sense, qualitative research may help to better understand why the policy preferences of the EP have changed (instead of measuring how much they have changed). However, qualitative methods have received criticism on several fronts, especially on grounds of reliability, objectivity, interpretation and generalisability (see for instance, Aberbach & Rockman 2002; Dexter 1970; Harrison & Deicke 2001; Odendahl & Shaw 2002)¹². This study uses triangulation (Burnham et al. 2004, 206; Grix 2001, 84), in order to increase the reliability of data (especially of information obtained during interviews). As shown below, the analysis is based on case studies, using process tracing and an analysis of language and discourse. Both process-tracing and the analysis of discourse rely on semi-structured elite interviews.

2.2.2.1. Case studies

Basing the study on three case studies fulfils two related objectives: first, to test the theoretical models with empirical cases in order to maximise the explanations of change; second, to manage the access to empirical data. By focusing research on a reduced number of case studies, access to data such as informants or legislative documents becomes more manageable.

It has been often mentioned that case studies present the problem of generalisability, since a low number of cases render the extrapolation of findings unreliable. However, since the object of the project is to understand change and its mechanisms, case studies may be used to advance at a theoretical level (Lijphart 1971, 691). Case studies are not used in the restrictive positivistic methodology of Lijphart (1971) or King, Keohane and Verba (1994); rather, they are open to complexity and 'embeddedness', since they are ideally situated to look at the succession of events leading to a certain outcome, instead of focusing research specifically on the outcome (Peters 1998, 141). Therefore, this method is particularly relevant when looking at processes and mechanisms, especially when it is combined with process tracing (Hall 2003, 396).

¹² For problems related specifically to elite interviewing, see (Berry 2002; Dexter 1970; Harrison & Deicke 2001; Lilleker 2003; Seldon 1988; Walford 1994).

The choice of case studies aims to enhance the comparative nature of the research. The three cases selected share a high level of political and institutional saliency; they were all intensely debated inside and outside the EU institutions and clearly went beyond being technical issues. This aspect proved essential to improve the chances of obtaining hard data as well as interviews. However, the case studies also reflect substantive and procedural dimensions¹³ that cover the main distinctive elements of the AFSJ.

Table 2.1.: Case Studies

Substantive dimension	Procedural dimension		
		Co-decision	Consent
	Migration	<i>Returns (2008)</i>	
	Data Protection	<i>Data Retention (2005)</i>	<i>SWIFT (2010)</i>

Table 2.1. illustrates the choice of case studies. As can be seen, they cover all the possible configurations, except for ‘consent’ and ‘migration’. The two categories (procedural and substantive) respond to specific dynamics in the AFSJ (see Chapter three for details). In short, the procedural category focuses on the two decision-making modalities that introduced changes in the formal and informal rules of the game. After 2005 (in the case of co-decision) and 2009 (in the case of consent), the EP has clearly broadened its influence in EU decision-making. Therefore, both occasions offer an ideal situation to study the influence of decision-making rules on the shape of policy preferences.

The second category tackles the content of these preferences. In the AFSJ, there is a clear distinction between two dimensions of risk (Monar 2006), one related to migration and borders, and the other dealing with counter-terrorism, which has often focused on the sharing of personal data – generally raising concerns about data protection. In fact, the LIBE committee gained its reputation as a protector of civil rights and liberty mainly in the field of data protection. Therefore, it is expected that change in the policy preferences of the EP will be easier in the field of migration than in data protection. The latter becomes a ‘least-likely’ category. This consideration influences the order of the case studies. First, the

¹³ Several authors identify procedural and substantive issues as the main dimensions of policy-making and preference formation (e.g. Maurer & Parkes 2007; Müller 2004).

two co-decision cases (the ‘Data retention’ and the ‘Returns’ directives) are compared in order to see whether there are any substantial differences between migration and data protection. Second, the ‘Data retention’ directive is compared to the SWIFT Agreement in order to compare two ‘least-likely’ situations under two different decision-making procedures.

Finally, the choice of case studies also contains an element of longitudinal comparison. The time-span covers five years, which should facilitate the study of change. In terms of research design, it is essential to include a temporal element to the analysis, since the focus of the research stresses the evolution of institutions, norms and preferences over time. The emphasis on change avoids certain tendencies towards ‘over-determination’ present in some constructivist studies (Checkel 1998, 339).

2.2.2.2. Conjunctural process tracing and the use of language

Process tracing is a method that allows identifying a chain of events in a “theoretically informed way” (Checkel 2006b, 363). Although it emphasises the more descriptive element of the analysis, it is necessary in order to recognise the mechanisms of change (Checkel 2006b). In this sense, process tracing is, basically, a system that allows researchers to collect and organise empirical data dealing with a specific process or phenomenon in a systematic way. Checkel (2006b, 2006a) associates process tracing with positivist epistemologies due to its emphasis on causal mechanisms. However, if process tracing is combined with an analysis of language, it can overcome its bias towards causality; instead, it can highlight nodal points and detect interactions between actors and their context. Klotz and Lynch (2006, 360) consider the possibility of using process tracing in order to “[map] discursive conjunctures and disconjunctures over time”. In this sense, process tracing (combined with an analysis of language) allows one to identify not only mechanisms but also common discourses or narratives, consistent with an interpretativist epistemology (Finlayson et al. 2004; Klotz & Lynch 2006).

Since process tracing provides for a more descriptive analysis of the facts, it is important to combine it with an analysis of discourse. Paying attention to the language used in oral communications and in the content of documents is especially important from an interpretativist perspective (Dunn 2006, 374), since it offers the possibility to ‘unpack’ what is said in order to offer interpretations that do not take this speech act at face value. It

thus considers that language and speech have a transformative effect: discourses reflect an understanding of the given context but can also modify this context (Schmidt 2008). Analysing discourses and language has proven especially important for the study of security and process of securitisation (e.g. Buzan et al. 1998).

Process tracing includes a wide variety of sources, usually qualitative in nature (Checkel 2005, 6). To complement and check the information obtained with the interviews, the project integrated as much hard data as it was possible to gather. Mainly, it used official documents such as Council minutes; EP reports and opinions; Council reports on LIBE meetings and various internal documents. These official documents were especially useful to trace back the formal legislative processes and to analyse the discourses used to justify certain proposals or amendments. The second category used was press releases from EU institutions or from individual MEPs (or political groups) to complement both the analysis of the process as well as the identification of particular discourses. Third, votes in the EP plenary were used to show the extent of agreement and the divisions inside each political group. Fourth, questions and debates in the EP proved essential for tracing the discourses and promoters of specific choices as well as the language and specific expressions used to convince other members. The fifth category were press articles from newspapers or advocacy groups, which often filled gaps and provided a very effective source for triangulating the information obtained in interviews. Finally, and more importantly, elite interviews were the main source of empirical data and are, therefore, analysed below in more depth.

2.2.2.3. Semi-structured elite interviews in the framework of EU studies

Elite interviews are not an unknown territory for most EU researchers, especially those using qualitative methods. However, not much attention has been paid to the use of elite interviews (as a methodology) in the EU literature. Elite interviews in European studies can be understood as (focused) interviews with individuals that have participated in a certain situation (e.g. in decision-making) and that with their knowledge can help define and provide specific understandings of a research question (Merton et al. 1956; Seldon 1988). In this sense, the definition of elites does not refer only to people in a position

of power or higher up in the hierarchy¹⁴ but rather to any person involved in the process under investigation. Whichever position the interviewee holds, he or she is able to provide the interviewer with information that is not otherwise available.

Interviewees in the framework of EU studies can be categorised in three broad groups. The first group is comprised of politicians, notably MEPs. This category of informants are characterised by their experience with interviews (mostly with the press) and their tendency to steer the interview. Monologues driven by the interviewee are not infrequent, especially when interviewing politicians that are higher up in the hierarchy and less hands-on in a specific policy-process (e.g. political coordinators, committee chairs, etc.). As others have noted, they do not make the best interviewees and their answers are not always the most reliable, especially if one is looking for factual information (Seldon 1988, 10; Walford 1994). However, if one is interested in discourse and norms of behaviour, they are often the best sources because, albeit usually unaware of it, their answers often emphasise these elements.

The second group is formed by EU officials – civil servants working in the EU institutions. They often offer a radically different picture to that of politicians. More centred on the formal side of institutions, they are better suited to obtain accurate factual information and usually are excellent at explaining the technical issues and specific provisions in legal texts. It is often useful to speak to officials at different levels of the hierarchy: desk officers usually prove to be excellent informants and have a deep knowledge of the issues at hand; heads of unit and higher officials usually offer a broader view and are particularly helpful when discussing inter-institutional matters. However, their accounts are not always as dispassionate and objective as some researchers may think (Seldon 1988, 10). They have a tendency to speak for their department or institution (Fitz & Halpin 1994, 42). However, if they sense that the interviewer has already got good background knowledge, they usually open up. With a bit of luck, they might even engage in a conversational exchange that will lead them to reveal their personal opinion.

The final group is a less consistent set formed of other individuals that may have been situated at the edges of the process; aware of what happened but without a direct stake in the results. For instance, MEPs assistants, political advisors, national experts or

¹⁴ Such understandings are frequently found in the literature. See for instance (Hertz & Imber 1995; Odendahl & Shaw 2002; Bygnes 2008).

even lobbyists can corroborate facts and opinions while having their own personal interpretation of the outcomes. Assistants and political advisors are particularly useful since they are not personally responsible for negotiations but know the details of the process very well. They can also comment on the motivations of political groups, namely why they chose a particular path of action.

One of the main difficulties that researchers face in EU studies – especially when using case studies – is the issue of temporality and reliability of sources. Seldon (1988, 6) had already identified time as one of the main challenges in the use of interviews. In elite interviews, memory is a conundrum: if the topic under discussion is too old, there is a risk that interviewees will have problems remembering details and factual information; if it is too recent, witnesses may be “clouded by personal impressions and, oddly enough, by the very recentness of the episode” (Robert Rhodes James quoted in Seldon, 1988, p. 6). Although such caveats are often mentioned in the literature, the central question of when an issue may be considered as too old to be reliable is often overlooked¹⁵. In the EU context, this amount of time does not seem to be very long: a case that dates back to three or four years has often proved to be too old; interviewees seem to have problems remembering details, especially factual information. However, if the case study is recent, interviewees’ responses often seem to be clouded by emotional reactions. It is difficult thus to assess the adequate ‘age’ for case studies, especially if there is not an unlimited number of cases from which to choose.

Adding to these possible challenges, time is also an important element to determine access to elites. The latter often prove difficult to identify or contact, due to the nature of policy-making and the employment market in Brussels. For instance, it is difficult to get access to those involved in the Council presidencies, since most national experts come only for the duration of the presidency. There are other sources of turnover: elections in the EP will probably see some MEPs leave and new ones arrive; the rotation of EU officials to other services every five years means that those responsible for a dossier might not be in the same DG (Directorate-General) any longer and become less willing to discuss some issues; national (seconded) experts posted in permanent representations or in EU institutions are often recalled by their respective capitals after several years service in

¹⁵ For an exception, see (Lilleker 2003, 209) who offers 10 years as a benchmark.

Brussels; MEP assistants tend to work for only short periods of time and therefore may have only witnessed a small section of the whole process.

Doing elite interviews in the AFSJ was not always a straightforward enterprise, especially when investigating the motivations or preferences of actors. On the one hand, actors in the area tended to perceive these issues as particularly sensitive and thus they added a layer of secrecy (or even mystery) to their information. For instance, interviewees were often reluctant to identify the position of member states inside the Council, although individual positions can frequently be guessed through Council minutes. This reticence to speak openly is amplified by the nature of the topics under discussion. Answers were not always satisfactory because interviewees were either secretive or relied on the platitudes of political speech.

In spite of these challenges, interviews can prove revealing and essential in helping us to understand this area of policy-making. It is precisely because the AFSJ reveals the ideological positions of those involved in decision-making more clearly than other policy fields that talking to actors can help understand the norms and beliefs surrounding specific issues. It can also reveal the extent to which these norms and beliefs are accepted and internalised by specific actors. Limiting oneself to official documents can lead to overemphasising certain explanations that, although not incorrect, might not resonate with those involved in the process.

In the present study, all the information provided in the interviews is acknowledged in the footnotes. Whenever possible, the answers provided by interviewees have been checked with other informants or official sources. In most cases, this technique has helped to strengthen the interpretation given in the analysis. When the answers have diverged, alternative explanations have been provided and contextualised in order to enhance their validity and reliability.

Conclusion

This chapter has provided a broad overview of the decisions that underpin this research project. In order to provide some consistency to the research design, it has dealt with three crucial meta-issues and the operationalisation of the research question. This is especially necessary when one uses ‘new institutionalism’ as the overarching research

paradigm, since it is silent on meta-issues and does not provide any specific orientation in terms of methods and operationalisation.

The first section has focused on the two principal variants of ‘new institutionalism’: rational-choice and sociological (or constructivist) institutionalism. These two variants have been retained because they are the most clear in terms of their conflicting ontological positions. Rational-choice institutionalism adopts a clear ‘objectivist’ ontology, considering that the social world exists independent of our understanding of it and that social objects have an independent existence. In comparison, sociological institutionalism understands social objects as being ‘mutually constituted’. In this sense, the social world does not have an independent existence but is constructed by social actors, who are, in turn, transformed by social structures. Since the aim of the project is to build upon rationalist and constructivist understandings of policy preference change, the choice of ontology is adapted to each variant of institutionalism.

In contrast, the objective to develop two institutionalist models based on two distinct ontological positions forces the choice of epistemology. The use of alternative explanations of change can only be consistent if a ‘soft’ interpretativist epistemology is adopted. In this sense, accepting that there can be several explanations of the same social phenomenon overcomes the issues linked to commensurability without disregarding the objective of drawing certain contingent generalisations.

These questions are also linked to the structure-agency debate. In some form or other, all the variants of institutionalism have integrated a bias towards structuralism. Its main tenet (‘institutions matter’) emphasises the role of rules, norms and organisations and renders agents as almost “unthinking actors”. Although this can be understandable in rational-choice institutionalism (where the assumption of rationality removes the capacity to choose from agents), it poses a bigger challenge for sociological institutionalism. Its constructivist ontology based on ‘mutual constitution’ requires a more balanced position between agents and structures. Therefore, the aim of this research is to “bring agents back in” in order to understand not only how institutions can affect the policy preferences and the behaviour of actors but also how specific entrepreneurs can shape and modify these institutions.

The final meta-issue linked to ‘new institutionalism’ is the question of change. The first wave of studies focused on stability rather than change, which led to stress

'exogenous' forces to explain any situations of institutional change. The most recent scholarship has moved towards 'endogenous' explanations of change. They emphasise the need to bring together the levels of analysis on which rational-choice (looking at micro-foundations) and sociological institutionalism (more interested in macro-structures) have traditionally focused. In this sense, they note how, in order to identify all the layers of change, it is essential to merge the micro- and macro- level favoured by each variant. This exercise can help to understand how changes accumulate and which direction they take. In consequence, this study looks at how policy preferences change, examines the layers of change and the 'directionality' of this process of adaptation.

The second section of the chapter has used these meta-theoretical underpinnings to justify the choices made in the research design. In this sense, it focuses on the operationalisation and the research methods employed to obtain empirical data necessary to answer the research question. These different aspects of the research design are essentially driven by the choice of epistemology. An interpretativist epistemology is ill at ease with some of the core tenets of positivist methodologies. In order to avoid the pitfall of using a language that does not fit with the epistemology of the project, the theory is operationalised using models, rather than variables. The use of models allows for the identification of proxies and it provides an effective guide for the development of narratives, avoiding the challenge of data overload. They also fit into an iterative research design which goes back and forth between theory and empirical data.

Finally, the choice of epistemology also sits more comfortably with qualitative methods, since they go beyond measurement and emphasise discourse and language. In order to limit some of the challenges of qualitative data (such as validity, reliability and generalisability), the different methods offer some space to triangulation. In order to emphasise comparison and the identification of narratives, the study is structured around three case studies covering essential substantive and procedural differences and providing for longitudinal analysis. The case studies use 'conjunctural' process tracing to develop the narratives and organise the empirical data. These data have been collected from a wide array of hard sources and from semi-structured elite interviews.

The choices made in this chapter are essential in maintaining the coherence of the study and to ensure the validity of the conclusions. In consequence, the following chapters build on the various issues discussed in this chapter and the final conclusions reflect upon

the main considerations of commensurability, role of structures and agents as well as the shape and direction of change.

Chapter 3: Setting the Context

Introduction

This chapter¹⁶ aims to clarify the substantive and procedural dimensions specific to the AFSJ and to the EP. In order to underline the particularities of each dimension, the present chapter reviews the substantive dimension (AFSJ) and the procedural dimension (EP) separately. In this sense, the aim is to reveal the narratives behind the academic literature and, at the same time, provide an overview of the dynamics and the structure of each dimension.

The first section focuses on the long-term evolution of the AFSJ, looking in particular at the progressive communitarisation and institutionalisation of this policy area as well as the substantive narratives that underpin this evolution. In this sense, it reconsiders the particularities of the AFSJ and the extent to which they can still be considered an exception in the institutional and policy-making framework of the EU. The section also underlines the rationale behind the construction of an area of internal security; drawing on theories of securitisation to explain the primacy given to security over the other two objectives (freedom and justice) included in the Treaties.

The second section looks at the parallel growth of, on the one hand, the EP as part of the EU's institutional framework and, on the other hand, the scholarship dedicated to explaining the changes in the institutional balance. This section reviews the two waves of EP scholarship; the first one, which conceptualised the EP as a 'black box', looked at the EP as a unitary institution participating in the process of European integration and, increasingly, in EU decision-making. In contrast, the second wave started to look inside the EP. This change in the focus of analysis has provided a growing knowledge of how the EP functions – looking at its institutional organisation, its main actors, and the main political

¹⁶ Please note that elements of this chapter have been published in A. Ripoll Servent, 2010. Point of No Return? The European Parliament after Lisbon and Stockholm. *European Security*, 19(2), pp.191-207; and A. Ripoll Servent, 2011. Playing the Co-Decision Game? Rules' Changes and Institutional Adaptation at the LIBE Committee. *Journal of European Integration*. Available from: <http://dx.doi.org/10.1080/07036337.2011.566332> [Accessed 4 May 2011].

dimensions. As will be shown, this overview of the internal workings of the EP is essential for establishing the bases for further analyses of decision-making.

3.1. The Area of Freedom, Security and Justice: Less intergovernmental, more securitised?

The AFSJ is not a policy area that lends itself to easy comparison with other traditional policy areas of the EU. Unlike most regulatory policies, the AFSJ did not emerge from a pure 'single market' rationale, but rather from an internal security motivation. As Monar (2001) underlined, there was a symbiosis between these two rationales; the idea to create a Single Market gave the necessary impetus to the establishment of the 'four freedoms' (goods, services, capitals and people), which, in turn, justified the abolition of internal borders. However, the disappearance of these internal borders raised concerns about the different standards of protection at the external borders. These external borders ceased to be mere national borders and became a shared responsibility for all the members that agreed to create an area of free movement (the Schengen area).

As a consequence, this policy area has grown in an unusual (and often erratic) way in response to events and crises. The area covers a diverse range of issues (e.g. from data protection to borders and from terrorism to the integration of immigrants or civil law cooperation); however, not all of them have been developed at the same speed, despite often being closely related. For instance, irregular immigration has been more widely legislated than regular immigration, despite their similar cross-border effects and evident interrelation. As a direct consequence, research on the AFSJ has experienced equally irregular developments. In general, this area of study has been characterised by two trends. First, research has focused on particular policy fields; this has led to policy-oriented studies, focusing on details and obviating more general dynamics and institutional structures. In fact, only a handful of books have been published on the AFSJ as a whole (and these only very recently). The second trend of this research area is its emphasis on legalistic approaches. The study of the AFSJ has drawn from numerous disciplines (migration studies, geography, history, sociology, etc.), but a high proportion of academics come from legal disciplines (see for instance Peers 2011). This has led to a generalised emphasis on the content of texts and treaties, often overlooking essential questions of

power and institutions. This means that there are few academic articles or books looking at the general development of this area from a broader perspective, not only examining the content of the different policy areas but also its general trends. More importantly, there are even fewer references to the institutional context of the AFSJ. In consequence, this first part aims to review this (somewhat narrow) literature on the institutional construction of the AFSJ, while the second part focuses on the substantive rationale behind this construction.

3.1.1. Procedural aspects: From intergovernmentalism to communitarisation

The AFSJ has been characterised by an uneven but constant growth and a rising importance inside the institutional and constitutional framework of the EU. From an area characterised by its intergovernmental character, it has become one of the main objectives of the EU, included in the Treaty of Lisbon before the Single Market, the European Monetary Union (EMU), and the Common Foreign and Security Policy (CFSP) (Monar 2010d, 23). Consequently, one of the main debates around the evolution and the structure of the AFSJ concentrate on whether this policy area has been supranationalised, and to what extent it can now be considered part of the institutional mainstream. The most recent overviews of the AFSJ's institutional structure seem to agree that this area has become a less awkward partner – more similar to other traditional policy areas than to its intergovernmental origins. Research on the institutional evolution of the AFSJ concentrates on three main dynamics: the Europeanisation (or supranationalisation) of the area; the 'normalisation' of its institutional structure; and the externalisation of its objectives.

3.1.1.1. Towards a Europeanised area of internal security?

The analysis of the origins and evolution of the AFSJ has centred the attention of those researchers interested in the dynamics of this policy area. Particularities such as the division of the area into two pillars or the existence of opt-outs for some member states (UK, Ireland and Denmark) have made the investigation of the process of integration all the more relevant (Lobkowicz 2002). Monar (2001) looked at specific laboratories and identified those driving forces that explained the dynamics of change in the AFSJ since its origins. He underlined the importance of past experiences outside the EU framework, which served as laboratories for cooperation at the European level. In this sense, the collaboration between member states in the framework of TREVI (an intergovernmental group cooperating mainly on issues of terrorism and organised crime), Schengen, or the

Council of Europe facilitated the Europeanisation of internal security matters. On the one hand, it facilitated the formation of trust among very reluctant actors; on the other hand, the realisation that an effective cooperation in these issues was possible created a fissure in the principle of sovereignty and territoriality, one of the main impediments to integration.

Kaunert (2005, 2011) looked at this period of integration (i.e. before the 1990s) as one during which the rationale for cooperation in the field of internal security shifted. From a norm of sovereignty and mistrust, shared by almost all member states, the re-launch of the Single Market (and, especially, of its four freedoms objective) created the necessary justification for cooperation in this field. The dismantling of internal borders was used to validate a link between the area of internal security and the Single Market in the form of ‘compensatory measures’ that would ensure the security of the external borders, now shared by all member states participating in Schengen (see also Monar 2001). However, despite the increased cooperation at EU level, Kaunert (2011) argued that there was still no agreement on the form that this cooperation should take, hence the particular shape that this policy area took in the Treaty of Maastricht. Indeed, he considered that these disagreements were only closed in the Treaty of Lisbon, where objectives and tools were matched and a consensus emerged around the necessity to supranationalise the AFSJ.

These disagreements around the shape of the AFSJ are clearly visible in the dynamics that have prevailed during its construction. Monar (2010d, 2011) identified two essential dynamics; first, the rapid widening of its agenda – characterised however by its emphasis on softer forms of governance – and, second, the blurring of the pillar divide – whereby instruments of the first pillar were applied to the third pillar (such as the notion of ‘direct effect’, introduced by the ECJ in its *Pupino* ruling [European Court of Justice 2005a]) and structures of the third pillar were introduced in the first pillar (most notably the creation of Frontex¹⁷, heavily controlled by member states despite falling under the Community framework). Despite the progressive streamlining of these particularities (especially after the entry into force of the Treaty of Lisbon) some legacies of the third-pillar and the intergovernmental period remain (Monar 2010a). Most notably, Monar (2011) warned that the emphasis on soft law and cooperation (rather than harmonisation) could have serious implications for the effective implementation of this widening agenda.

¹⁷ The European Agency for the Management of Operational Cooperation at the External Borders (FRONTEX) became operational in 2005.

3.1.1.2. *After the Treaty of Lisbon, a 'normal' institutional structure for the AFSJ*

The growing Europeanisation of the AFSJ has had a direct impact on the analysis of the main actors involved in policy-making. During the 1990s, the emphasis laid on (domestic) security actors (e.g. Bigo 1994) or on state-centric approaches reflected the intergovernmental nature of the AFSJ. For instance, Guiraudon's 'venue-shopping' thesis (2000) stressed the capacity of some national actors, especially interior ministers, to escape the realm of domestic politics and legislate at EU level – far away from the control of domestic debates and other national actors, especially justice ministers. Lavenex (2006, 332) also noted how cooperation at a higher level developed into an 'autonomy-seeking behaviour' among security actors; namely, by pushing security issues up to the European level, national actors constructed a new field where they shared a set of definitions, semantics, technology, etc. that was independent from national networks, yet not completely disconnected from them (Bigo 2000, 185; Huysmans 2006, 91-95). However, with the progressive Europeanisation of interior policies, these theses were questioned for overlooking the role of supranational institutions, especially the Commission (Maurer & Parkes 2005, 3-4). For instance, Niemann (2008) presented an alternative explanation to the progressive Europeanisation of the AFSJ, revitalising neo-functionalist theses. These debates have not yet disappeared, as a recent volume evaluating the strength of the venue-shopping thesis after the Lisbon Treaty proves (Bendel et al. 2011).

The progressive evolution of the AFSJ, especially after the Treaty of Amsterdam, led to a renewed interest in the role played by supranational institutions (e.g. Lobkowicz 2002). In this sense, Uçarar (2001) and Kaunert (2011) concentrated on the Commission, looking at the leading role that the institution (and especially some individuals in it) played in the construction of this area. They noted that, despite its limited powers, the Commission effectively pointed at the gaps left by intergovernmental methods (such as the difficulty to reach unanimity) or at the possible linkages with other fields of European integration in order to gradually increase its own powers and modify the institutional structure. Monar (2010d) also remarked that, in contrast to other traditional policy fields, the AFSJ was characterised by having lived through more far-reaching changes in the institutional balance of power, since it was not only the EP and the ECJ that increased their powers but also the Commission. This change in the institutional balance brought the AFSJ

closer to the classical “quadripartisme”, with the Council, the ECJ, the EP, and the Commission sharing power (Pierre Pescatore cited in Monar 2010d, 42).

In this sense, a recent book on the *Institutional Dimension of the European Union's AFSJ* (Monar 2010d) presented the best overview of the role played by the different institutions in this policy area. It reviewed not just the traditional EU institutions but also the increasingly important role of EU agencies and coordinating roles such as the EU Counter-Terrorism Coordinator. Nilsson and Siegl (2010) pointed out the three specific dynamics of the JHA Council: first, the inherent tension between an interest to cooperate in internal security matters and the continued attempts to keep national competences intact; second, the complex institutional architecture, due to added levels of internal decision-making as well as its variable membership¹⁸ (Nilsson 2002, 2004); finally, they also noted the central role of the Council Secretariat in shaping the AFSJ. Indeed, for a long time, the Council Secretariat possessed more information and expertise than the Commission. Lewis and Spence (2010) underlined the challenges that the centrality of the Council represented for the Commission, which often had to prove its value and determination despite the limited resources at its disposal. Finally, De Capitani (2010) offered an in-depth account of the EP's role in the AFSJ and provided the details and anecdotes that only insiders can offer. At the same time, he emphasised the construction of the EP's (and especially the LIBE committee's) reputation around issues of fundamental rights within the European Union. The importance given to rights-based approaches and a wider conception of a European public order situated the EP in a position of constant conflict with the Council and member states. De Capitani showed how these conflicts reached a high point in data protection issues, for instance during the Passenger Name Record (PNR) and SWIFT sagas (see also Chapter seven).

The attention paid to the role of agencies is significant, since (as Monar [2010d, 43] pointed out) they remain mostly outside the reach of the EP and the ECJ. Most research has focused on this gap between governance by agencies and the ability to retain oversight over their activities. Despite the increasing number of agencies and their complex

¹⁸ Between COREPER and the Council working groups, there was an additional level of decision-making formed by CATS (Article 36 Committee, for third-pillar matters) and SCIFA (Strategic Committee on Immigration, Frontiers and Asylum) for first-pillar issues. The opt-outs affect the United Kingdom, Ireland and Denmark. The composition of the JHA Council may change, for instance, when Schengen issues are discussed. In that case, the non-EU members of Schengen participate in the discussions.

interrelations (Bigo 2007), most research has tended to focus on one specific agency, especially on Europol¹⁹ (Brady 2008; Bures 2008; De Moor & Vermeulen 2010; Den Boer & Bruggeman 2007; Kaunert 2010a; Puntischer Riekmann 2008) and Frontex (Jorry 2007; Léonard 2009, 2010; Neal 2009). In contrast, Eurojust²⁰ (Mangenot 2006; Mégie 2007; Vlastník 2008; Xanthaki 2007) and other specific actors and structures such as Sitcen (Joint Situation Centre)²¹ or networks of security professionals have received less academic attention, probably as a reflection of the limited extent of their activities or the difficulty of getting access to them.

3.1.1.3. *The externalisation of the AFSJ*

Finally, research on the AFSJ has turned its attention to the external dimension of the policy area. In general, most literature has either focused on a specific policy issue or on the definition of an 'external dimension' of the AFSJ. For instance, migration (both in terms of irregular immigration and asylum) has been widely investigated for its tendency to externalise controls and underline security aspects when dealing with third countries (Boswell 2003; Chou 2009; Lavenex 2006; Lavenex & Kunz 2008; Lavenex & Uçarer 2004). In a very different context, research on the external dimension of the AFSJ has also concentrated on counter-terrorism, especially in the relationship between the EU and the US. If, in the area of migration, the EU is usually presented as the promoter of norms and the stronger partner – often using conditionality to achieve its objectives (Lavenex & Uçarer 2004; Lavenex & Wichmann 2009) –, in counter-terrorism the EU is usually presented as the norm-taker or the weaker partner (Aldrich 2009; Archik 2010; Argomaniz 2009; Bures 2006; Kaunert 2010b; Kaunert & Léonard 2011; D. Keohane 2005, 2008; Occhipinti 2010; Rees 2006; Wright 2006).

On the other hand, only a limited amount of the academic literature has investigated the institutional dimensions of the external dimension of the AFSJ or the capacity of and mechanisms used by the EU to export its values abroad (Eriksson &

¹⁹ The European Police Office (EUROPOL) was established in 1992 with the aim to coordinate and create trust among national law enforcement forces, and only became fully operational on 1 July 1999.

²⁰ The European Union's Judicial Cooperation Unit (EUROJUST) was created in 2002 to create a similar network to that of Europol but for national judicial authorities.

²¹ Sitcen (or Joint Situation Centre) is an intelligence body working inside the Council. It was established in 2002 and is based on the voluntary contribution of intelligence by member states in order to assess possible threats on European territory.

Rhinard 2009; Monar 2004; Rees 2008). Most overviews have focused instead on the conceptualisation of the external side of this policy area. Some have understood it as synonymous with the European Neighbourhood Policy (ENP) (Balzacq 2008a, 2009), while some others have tried to widen its definition and areas of study. For instance, Wolff et al. (2009, see also other articles in the special issue) defined it as a “policy universe”, where different actors, policies and initiatives share a single purpose, namely the protection of EU citizens from internal and external threats. On the other hand, the special issue edited by Kurowska and Pawlak (2009) underlined the ambiguities and overlaps between CFSP or ESDP objectives and the AFSJ, looking at how internal security tools and policies are used to achieve these foreign policy objectives due to their ‘softer’ nature.

In general, the external dimension of the AFSJ is a potential area for growth, both empirically and academically, especially after the entry into force of the Treaty of Lisbon (Monar 2010b; Santos Vara 2008). In a sense, it shows the extent of institutionalisation experienced by the AFSJ in a very short period of time. However, it also underlines the lack of cohesive approaches to study this policy area, especially its institutional dimension.

3.1.2. Substantive aspects: Securitisation as the main rationale of the AFSJ

The introduction of the concept of securitisation in the area of security studies amounted to a minor revolution during the 1990s. Breaking with the traditional, and rather narrow, conceptualisations of security developed mostly during the Cold War, the concept of securitisation enlarged the field of study and broke with the neo-realist mainstream. As formulated by the Copenhagen school, securitisation considers that “labelling something as a security issue imbues it with a sense of importance and urgency that legitimises the use of special measures outside of the usual political process to deal with it” (S. Smith 1999, 85). Securitisation is thus “the move that takes politics beyond the established rules of the game and frames the issue either as a special kind of politics or as above politics” (Buzan et al. 1998, 23). In order to become securitised, an issue has to first enter the realm of politics, i.e. become an object of policy-making or policy-speaking and then be addressed inside the public debate as an issue linked to security. During this two-step process, the issue grows to be constructed as a threat to a (equally constructed) referent object (e.g. state, identity, values, etc.) (Buzan et al. 1998, 23).

The Copenhagen school emphasises three elements: the speech act – understood as a performative moment –, the securitising actors, and the audience. However, these notions have revealed themselves to be rather narrow, especially when applied to EU policies and policy-making (Baker-Beall 2009; Balzacq 2008b; McDonald 2008; Stritzel 2007). In order to understand the practices of securitisation in the EU, it is essential to go beyond the speech act as a moment of uttering security and understand it as a process of long-term institutionalisation (Bigo 1998; Huysmans 2006; McDonald 2008). EU security discourses amalgamate and build on different dynamics that give a specific sense and content to the AFSJ. As seen above, the construction of an internal space of security and freedom of movement was built around the idea of ‘compensatory measures’, i.e. internal instruments that compensate for the removal of internal borders (Geddes 2000; Huysmans 2006; Melis 2001; Monar 2001).

It has been noted that this understanding of EU security places the external borders of the EU as the *raison d'être* of the AFSJ, thereby linking internal security to migrants and foreigners in general. Geddes (2000) showed how the linkage between migration and security was enhanced during the 1990s by conflating asylum and economic migration under the same umbrella and stressing their weight on domestic societies and economies. At the same time, he also showed how, from the 1990s, member states hardened both immigration and asylum discourses and practices, a tendency that was transferred at EU level through the construction of common policies. In this sense, Monar (2006) drew attention to the use of language in the Treaties; after the Amsterdam Treaty, Justice and Home Affairs was transformed into an Area of Freedom, Security and Justice, thereby implying that the existence of a single internal security area presented common challenges that needed a unified response. The terrorist attacks of 11 September 2001 created a new impetus for security discourses (Den Boer & Monar 2002), transforming terrorism into a new ‘master signifier’, understood by Buzan and Waever (2009, 267) as a legitimising tool embedded in a process of ‘macro-securitisation’ (i.e. a process of securitization developed at the system level). Along the same lines, Baker-Beall (2009) showed how EU counter-terrorism measures link terrorism to migration through narratives of ‘otherness’ and risk prevention.

However, in order to understand the process of securitisation at EU level, several authors have noted that it is essential to go beyond discourses and include institutional

practices (Bigo 1998) and tools (Balzacq 2008b). Lavenex and Wagner (2007) argued that, given the nature of EU governance, the capacity of the European Union to produce positive legislation is limited; in consequence, most actions undertaken in the AFSJ are of a regulatory nature, anchored in legal definitions of security and threats. Neal (2009, 337) appropriately questioned “whether any of the EU institutions have the constitutional, institutional, political or legal capacity to ‘use extraordinary means’ or ‘violate rules that otherwise would bind’”. Instead, EU practices and tools developed a ‘governmentality of unease’, which – by using technical controls such as databases and biometrics – resulted in a ‘security continuum’ that reinforces the link between migrants and security (Bigo 1998, 2000). In this sense, Balzacq (2008b) identified specific tools such as databases – for instance the Schengen Information System (SIS) or the Visa Information System (VIS) – as (unexpected) sources of securitisation due to their potential to profile and control movement for counter-terrorism purposes. The result is that these practices of securitisation have shaped the AFSJ by emphasising security over freedom and justice – with a special emphasis on the exchange of information (Mitsilegas et al. 2003, 85; Monar 2006). This dynamic is especially evident when looking at the control and profiling techniques used around the border, which aim to prevent entrance – mostly by using visa policies (Guild & Bigo 2003; Melis 2001, 133) – and facilitate removal from the territory, as exemplified by the recent initiatives on returns (see Chapter six) and readmission (Bouteillet-Paquet 2003; Trauner & Kruse 2008).

The question of audiences has also come to the fore, especially due to the difficulty in identifying a European public (Balzacq 2005). Neal (2009) underlined the differences between national dynamics of securitisation (where speech acts uttered by securitising actors – especially political leaders – are easy to broadcast through national media) and the diffuse linkage between EU actors and audiences that remain domestic and disconnected from EU messages. However, audiences can be understood as a social context within which discourses need to resonate in order to be effective. For instance, Buzan and Waever (2009, 274) indicated how the US Global war on terror is becoming less effective as a legitimising tool, since its message is losing resonance with the US audience, especially when it involves infringements of domestic civil liberties.

Finally, the literature on securitisation in the AFSJ has also looked at variations in the ‘security capital’ of specific actors – that is, the ability of certain actors to transform an

issue into a security element as well as their aptitude to use discourses to legitimate a particular conception of security. As seen above, the literature has traditionally focused on state-centred actors, emphasising the role of national representatives in the Council as well as security agencies, understood in their largest conception – from national police, army or intelligence services to EU-wide networks gathered in agencies such as Frontex or Europol (Lavenex & W. Wagner 2007). Bigo (2000), underlined that this capacity to create security is nevertheless not a stable phenomenon but contingent on dynamics of competition, domination and change among securitising actors.

Significantly, various studies that looked at the potential effects that supranationalisation, i.e. an increase in the powers of supranational institutions, could have on the processes of securitisation remained sceptical of their capacity to gather the necessary ‘security capital’ to produce changes in the rationale of the AFSJ. In the aftermath of the Treaty of Amsterdam, Kostakopoulou (2000) doubted that the increase in powers of supranational institutions such as the Commission and the EP would be enough to modify the ‘cognitive frameworks’ privileging security over liberty. Maurer and Parkes (2007) analysed the prospects of change after the first asylum directives passed under consultation. They considered that the EP had not been accorded enough ‘security capital’ to change the ‘policy image’ of asylum policies, despite having won considerable influence after the Amsterdam Treaty. These studies underline the necessity to look at both the procedural and substantive dimensions of change, and pay special attention at any tensions between these two dimensions.

In general, studies on securitisation have proved essential for the purpose of identifying the substantive rationale motivating the choice of policy preferences in this area. By linking ancillary issues such as migration or the use of databases to discourses and practices of security, policy actors have normalised the prevalence of security over liberty and justice. In this sense, this first section has shown the erratic and often narrow study of the AFSJ. Its procedural dimension has often overlooked questions of power and processes of institutionalisation, especially in regards to the EP. On the other hand, the substantive procedure has revealed a generalised process of securitisation, which is taken here as a starting point and as the underlying rationale of this policy area.

3.2. The European Parliament: From ‘black box’ to ‘normal’ parliament?

The second section of this chapter offers an overview of the EP’s institutional development and aims to explain how it works. The literature on the EP witnessed two moments of glory; the first one during the early 1980s and the second since the end of the 1990s. Indeed, scholarship on the EP has witnessed a resurgence, which has increased not only the quantity of research undertaken on the institution but also its scope. Most recent scholarship has left integration theories behind and looked at the EP from a comparative perspective – unpacking the ‘black box’ and focusing on its internal workings. Despite this revival, there are few monographs dealing specifically with the EP. There are currently two textbooks on the EP: Corbett et al. (2007) offer a detailed description of the EP’s functions, procedures and structures; in comparison, Judge and Earnshaw (2008a) approach the EP from a more analytical perspective, examining the role of the EP in EU policy-making as well as the implications for its representative functions and its legitimacy. Apart from these general works on the EP, some other monographs have looked at specific aspects of the EP and are therefore examined in more detail in their respective areas of research.

3.2.1. *First wave of EP scholarship: a Parliament in the making*

Research dealing with the European Parliament has followed a similar development to that of the actual institution. A low-key object of research for a long time, it became the focus of attention during the late 1970s and beginning of the 1980s, due mainly to the increase in its budgetary powers and the direct elections started in 1979. Consequently, this first wave of scholarship was characterised for either being very descriptive (Cocks 1973; Fitzmaurice 1975; Kirchner 1984; Palmer 1981) or for approaching the EP from a normative perspective, looking at the EP as a step further towards a political project of European integration (Birke 1961; Fitzmaurice 1978; Herman & Lodge 1978; Herman & Schendelen 1979; Lodge & Herman 1982; Marquand 1979; Oudenhove 1965; Scalingi 1980).

After this first wave, enthusiasm for the EP declined both in the political and academic arenas. This was caused by the persistence of large areas of unanimity in the Council – either determined by the Treaties or introduced *de facto* by the Luxembourg

compromise – and the lack of influence of the EP in EU decision-making. Therefore, the introduction of the cooperation procedure in the Single European Act (1986) and, especially, of the co-decision procedure in the Maastricht Treaty (1992) created a small revolution both for EU policy-processes and for academics interested in EU affairs. This change gave rise to a large range of scholarship, looking at the EP from three different perspectives: integration theories; normative theories; and decision-making. The latter is the most relevant area of research for this study since it deals with the role of the EP in procedural and bargaining processes and, consequently, it is discussed in greater depth in Chapter four, which outlines how the EP participates in decision-making and conceptualises the co-decision procedure.

3.2.1.1. The EP in integration theories

The first strand of literature looks at the EP as either an actor or a product of European integration. In this sense, it approaches the EP from the perspective of grand theory-making, focusing on its growing powers and influence in the EU institutional triangle. From an insider perspective, former EP Secretary-General Julian Priestley (2008) presented the major ‘battles’ fought by the EP in its quest for competences and powers in the form of six narratives. Replete with anecdotes and details, the book underlined the long-standing engagement of the EP in its attempts to increase its institutional powers. It also underlined the significance of key individuals, who were successful in using either their political clairvoyance or a favourable window of opportunity to expand the competences of the EP. This description complemented previous research by Corbett (2001), who used EU integration theories to evaluate the capacity of the EP since the introduction of direct elections to be influential in decision-making and treaty reforms. Finally, Rozenberg (2009) underlined how the distance between the EP and EU citizens helped to isolate policy-making and strengthened the EP’s quest for more powers and influence in the EU institutional framework.

In recent years, some authors have turned their attention towards periods of institutional change between Treaty reforms and the use of informal procedures to modify formal Treaty rules. In this sense, they look at the EP as a product of the integration process as well as one of its actors. Garman and Hilditch (1998) looked at both formal and informal developments in the conciliation procedure, which resulted in increased powers for the EP. Similarly, Maurer (2007) looked at how the EP made use of grey zones in the Treaties to

expand its functions and powers, especially through the use of inter-institutional agreements. Rittberger (2005) also tackled the question of the EP's creeping powers in a theoretically-grounded study comparing rational-choice and sociological institutionalist explanations of competence delegation to the EP. He concluded that perceptions of a democratic deficit at the EU level helped the EP to portray itself as the most legitimate instrument to fill a perceived gap in direct representation. Finally, Hix (2002a) looked at processes of rule interpretation in-between treaty reform to explain the changes introduced to the co-decision procedure by the Treaty of Amsterdam. Farrell and Héritier (2007a, 2007b) developed the idea of "interstitial" institutional change in order to explain under which conditions the EP could be more successful in its attempts to introduce changes to the formal procedures.

3.2.1.2. Normative approaches: the EP as a representative institution

A second strand of scholarship looked at the EP from the angle of democracy and representation, which usually led to normative judgements on the role that the EP should have in the institutional structure of the EU. For instance, Hix and Bartolini (2006) started a debate on the desirability of politicising the European Union and transforming it into a parliamentary system. This debate triggered several reactions leading to broader considerations about the ideal political system for the EU, usually in the form of either a parliamentary democracy or a full separation of powers system similar to the US (Judge & Earnshaw 2003, 2002; Magnette & Papadopoulos 2008; Mair & Thomassen 2010; Shackleton 2005).

These discussions emphasised normative considerations about the shape and role of the EP and they are especially prominent in academic debates dealing with the democratic deficit and the representative function of the EP (Judge & Earnshaw 2008b). For instance, Hix (2008) considered that politicising the EU (e.g. linking the EP's elections with the political orientation of the Commission) would be the solution to the EU's democratic deficit (see also Hix & Hagemann 2009). Katz and Wessels (1999) considered the role orientations, partisan linkages, and internal workings of the EP in order to evaluate their normative implications for the EU's democratic deficit and the connection between the EU and its citizens. In a similar way, Blondel et al. (1998) questioned the attempts to supply more EU legitimacy by increasing the role of the EP, arguing that the low levels of

participation and second order nature of EP elections questioned its capacity to increase the overall legitimacy of the EU.

These questions have sparked a growing literature on the nature and functioning of EP elections. Apart from some general overviews of each election (Lodge 1986, 1990, 1996, 2001, 2005, 2010; J. Smith 1994, 1995), most literature on EP elections approaches this issue from two perspectives, either as “geographical representation” (D. M. Farrell & Scully 2010, 38) or as a source of democratic representativeness for the EU institutional structure. The first category broadly concentrates on the relationship between the national level and its elected members. For instance, Bowler and Farrell (1993) raised the issue of domestic electoral systems and the impact that their diversity had on the role of MEPs (see also D. M. Farrell & Scully 2005, 2010; Hix 2004). Linked to that, other authors concentrated on how MEPs are selected at the national level (Gherghina & Chiru 2010; Meserve et al. 2011) and, especially, on how campaigns are fought and how different levels of political clarity can affect the level of information and interest of European citizens in EP elections (Bowler & D. M. Farrell 2011; Freire et al. 2009; Giebler & Wüst 2011; Maier & Tenscher 2006; de Vreese et al. 2006; Wüst 2009).

The second category revolves around the questions of whether (or to what extent) the EP represents European citizens. As seen above, the representative character of the EP has been a permanent fixture since the introduction of direct elections (e.g. Blondel et al. 1998; Brug & Eijk 2007; Kaniovski & Mueller 2011; M. Marsh & Norris 1997 and other articles in the special issue). However, the main debate has revolved around the two seminal works of Reif and Schmitt (1980) and van der Eijk and Franklin (1996) on the second order nature of EP elections. Their examination of EP elections led them to point out that these elections were not fought on European issues but were seen as secondary national elections, hence revolving mostly around domestic concerns. Since then, a considerable body of literature has updated and refined the concept, especially after each new election and the progressive enlargement of the EU to new member states (Eijk et al. 1996; Hix & M. Marsh 2007, 2011; Hobolt & Wittrock 2011; M. Marsh 1998; M. Marsh & Mikhaylov 2010; Schmitt 2005; Weber 2009). The debate around the second order nature of EP elections has been complemented by studies interested in understanding the low levels of turnout (e.g. Franklin 2001; Franklin & Hobolt 2011; Mattila 2003; B. Wessels & Franklin

2009) and the presence of vote switching between national and European elections (e.g. Hobolt et al. 2009; Kousser 2004; M. Marsh 2009).

3.2.1.3. *The EP in EU decision-making*

Finally, the largest body of literature in this first wave of EP scholarship revolves around the introduction and development of co-decision and, therefore, it is examined in more depth in Chapter four. In general, this literature focused mostly on procedural and bargaining models of co-decision. Most authors aimed to calculate the influence of the EP in inter-institutional relations (e.g. Napel & Widgrén 2006; Thomson et al. 2006; Thomson & Hosli 2006) and assess under which decision-making procedure the EP enjoyed more influence (for a review see Dowding 2000). More qualitative approaches fleshed out game-theoretical models and pointed out important gaps in the methodology and findings of previous game-theoretical studies. Judge and Earnshaw (1993; 1994; 1997; 2008a) used mostly case studies to deepen our understanding of formal and informal processes that shaped the role and influence of the EP in inter-institutional relations. Burns (2005) adopted a similar approach to evaluate the chances of success of EP amendments in different policy fields. From a slightly different methodology, Maurer (2003) presented the evolution of the EP in the legislative process since the start of co-decision and the effect it had had on the internal and external organisation of the EP.

Although very different in terms of their focus of study and theoretical approaches, most of the studies that composed this first wave of EP scholarship were characterised by their emphasis on inter-institutional relations and EU integration as a whole. With a few exceptions, they looked at the EP as a 'black box' – a unitary institution functioning inside the EU political system –, which was characterised, in turn, by its *sui generis* nature.

3.2.2. *Looking inside the 'black box': functions and dimensions of the EP*

The second wave of EP scholarship abandoned the idea that the EP is a unique institution and started to treat the EP as a normal parliament, which opened-up the possibility of using approaches based on comparative politics. This shift in the focus of research assumed that the EP had become "part of the European political 'establishment'" (Maurer 2007, 18) and that, as a result, researchers should go beyond the study of inter-

institutional relations and focus on internal politics. They took stock of some early studies focusing on the workings of the EP (Abélès 1992; Jacobs & Corbett 1990; Westlake 1994) and opened the 'black box'. In the last decade, this second wave of scholarship has burgeoned, giving way to three main areas of research: the organisational structure of the EP; the dimensions of MEPs' votes as well as voting behaviour; and the impact of internal dynamics on policy outcomes.

3.2.2.1. Organisational structures inside the EP

The first area of literature on the internal workings of the EP has been essential in increasing our knowledge of how the EP works as well as raising our awareness of the key functions that some actors play inside the institutional framework. It has mainly underlined the importance of committees; political groups and 'relais actors' (i.e. the gatekeepers who control the contacts with other internal and external actors). The gradual reinforcement of parliamentary committees is essential for the current study. Committees have existed since the creation of the Common Assembly in 1953 (Neuhold 2001, 3). They are organised around policy areas or specific thematic fields, such as human or women's rights, which determines their internal working methods. Westlake (1994, 191) was the first to point out that EP committees act as the "legislative backbone" of the EP. Since then, various authors have looked at studies of US committees (e.g. Asher 1974; Brenner 1974; Davidson 1974; Krehbiel 1992; Shepsle & Weingast 1987) to classify and examine the function of EP committees. In general, it has been recognised that committees fulfil an informational role, allowing members to specialise and become experts in a specific policy field (Bowler & D. M. Farrell 1995; Marshall 2010; Neuhold 2001; Ringe 2009; Yordanova 2009c). EP committees are also characteristic for their high levels of internal consensus (Neuhold 2007) and autonomy (Ringe 2009, 20); however, McElroy (2006) highlighted that committees are nonetheless highly representative of the political composition of the EP as a whole.

The representativeness of committees is crucial, since most political debates take place at that level. The leading committee is largely responsible for examining the details of the proposal and starting negotiations with the Council and the Commission. As a result, Neuhold (2001) underlined that debates in plenary rarely go into details and Hix (2005, 93) pointed out that new amendments are very rarely introduced at plenary level, where committee reports are treated as 'take-it-or-leave-it' options. Proksch and Slapin (2010a,

2010b, 2011) examined speeches and oral questions in plenary and showed that they were used for political purposes (e.g. to send signals to their national political party), rather than for legislative debates discussing specific policy alternatives. Ringe (2009) looked at the link between committees and plenary and underlined that committees generally dictate the direction of votes, especially given the increased workload of the EP and the technical nature of the dossiers. Some recent research has looked at inter-committee conflict (Bendjallah 2009), showing how the choice of rapporteurs has the potential to create a new line of conflict by opposing different committees (Burns 2006).

The study of specific committees, although limited in its scope, has underlined the importance of the dominant decision-making procedure to determine the working methods and the level of legislative influence enjoyed by specific committees. For instance, ENVI (environment committee) has become one of the most powerful committees inside the EP as a result of working mostly under co-decision (Burns & Carter 2009; Judge 1992; Judge & Earnshaw 1994; M. P. Smith 2008). In comparison, Roederer-Rynning (2003) looked at informal measures, such as amplifying and politicising European debates, taken by AGRI (agriculture and rural development) as a way to compensate for the lack of formal decision-making powers (AGRI functioned mostly under consultation, until the entry into force of the Treaty of Lisbon). Finally, some authors focused on committees characterised by their lack of decision-making influence. For instance, Diedrichs (2004) examined AFET (Foreign Affairs), while Beauvallet et al. (2009) looked at the composition of AFCO (Committee of Constitutional Affairs) in order to understand why, despite being a non-legislative committee, it still attracted the most prominent members of the EP, such as former Prime Ministers or other members of government.

In general, the literature on committees remains quite limited; there is a clear absence of more systematic studies on individual committees and, more importantly, there are almost no comparative studies of committees. Comparing committees would increase our knowledge of their different working methods and informal practices and could look at mechanisms of learning and institutional mirroring. One of the few comparative studies set the path by identifying differences between committees, showing that some adopted more competitive positions – among them the LIBE committee –, while some remained more consensual (Settembri & Neuhold 2009).

Political groups are the other main organisational structure inside the EP. These groups gather national delegations with similar ideological positions; in plenary, MEPs sit with their political group, not with other members from their country. Therefore, the presence of political groups is central to the workings of the EP and enhances the supranational character of the institution. This crucial feature attracted the attention of scholars from the earliest days of the EP (Fitzmaurice 1975; Oudenhove 1965) and the subsequent research on political groups tried to answer three questions. First, how does the party system in the EP look like; second, how do EP groups achieve cohesion and coherence; and, finally, how do political groups affect the working patterns and the behaviour of individual MEPs.

The first category of party politics literature ranges from general overviews of political parties in the EU and the EP (Gaffney 1996; Hix & Lord 1997; Kreppel 2001; Lindberg et al. 2008; Maurer et al. 2007) to more specific analyses of particular political groups. Despite the increasing attention paid to the different groups, most studies seem to concentrate on the smaller parties and, more specifically, on centre-right and right-wing parties. For instance, Abedi and Lundberg (2009) and Hayton (2010) looked at the case of the Eurosceptic UKIP (United Kingdom Independence Party), while Startin (2010) analysed the failed attempts to form a radical right grouping inside the EP. Bale et al. (2010) examined the journey of the British Conservatives from the EPP-ED (European People's Party-European Democrats) to the new ECR (European Conservatives and Reformists) group. Only Jensen and Spoon (2010) seemed to cross the ideological line by examining niche parties that included Green and regionalist parties as well as far-right and Eurosceptic parties. As for the larger groups, Jansen (1998) offered a history of the European People's Party (EPP) and Wagner (2011) broadened the analysis to include all the groups of the right. Interestingly, Wagner justified his choice of ideological side on the grounds that the right had always been more structured than the left. This overview shows an important gap in the analysis of left parties and larger groups such as the Socialists or ALDE (Alliance of Liberals and Democrats for Europe).

The second strand of literature on political groups deals with their capacity to behave cohesively and coherently despite lacking some of the instruments available to national parties – in particular, they lack the capacity to name candidates for the next elections (Hix et al. 2003, 2005). McElroy and Benoit (2007, 2010) found that national

delegations join those EP political groups that present the highest political congruence, which enhances party competition. Schmitt and Thomassen (2009) also noted that the dimensions of party competition have not substantially changed after the Eastern enlargement. Generally, two types of explanations have been offered to explain the capacity of EP political groups to ensure cohesion, namely policy specialisation (Hix et al. 2009) and the committee system and its internal organisation as a source of party discipline (McElroy 2001). Finally, Ringe (2009) offered the most comprehensive analysis to date by looking at both the role of committees and information shortages to explain how political groups maintain a high degree of cohesion in their policy preferences, which allows for clear inter-party competition.

The final strand of party politics literature concentrates on unearthing the links between EP political groups, national delegations, and individual MEPs. Generally, this relationship has been conceptualised as an 'agent with two principals' (e.g. Coman 2009; Hix 2002b). However, more detailed research has pointed out that the attachment to national parties is still stronger than the allegiance to EP groups (A. Rasmussen 2008a), especially in the period preceding the EP elections (Lindstädt et al. 2011). Despite the lasting importance of national delegations and the link with national parties, the literature on EP political groups confirms the central role that they play in organising the everyday life of the EP and in mapping the dimensions of party competition and voting behaviour.

The third category of actors looks at a more diffuse group, labelled as 'relais actors', due to their capacity to act as gatekeepers and link different levels of internal and external organisation (H. Farrell & Héritier 2004; Judge & Earnshaw 2011). The majority of studies on 'relais actors' have focused on the role of rapporteurs. They have looked, first, at how rapporteurs are selected and whether this selection biases policy outcomes (Benedetto 2005; Kaeding 2004; Mamadouh & Raunio 2001; Yoshinaka et al. 2010) and, second, at the conditions under which rapporteurs can be more effective (Costello & Thomson 2010; Høyland 2006). However, rapporteurs are not the only important figures in the EP. Whitaker (2001, 2005) looked at the control exerted by national delegations' leaders and group coordinators over the members of their group. Judge and Earnshaw (2011) recommended widening the definition of 'relais actors' to include other central actors, in particular shadow rapporteurs, who can play a crucial role in defining policy outcomes. In fact, it has proven difficult to identify and keep track of the main 'relais actors'. For

instance, Rasmussen (2005, 2008b) determined that, contrary to previous assumptions, delegates of the EP conciliation committee very rarely acted irresponsibly, while, in comparison, Winzen (2011) raised awareness of the political work that EP officials do behind the scenes.

This suggests that there is still scope for further research on the role and relative importance of ‘relais actors’, as well as the necessity to go beyond the analysis of rapporteurs to include other key figures. Another area largely overlooked has been the study of individual MEPs. Most research looking at MEPs has focused either on their process of socialisation or their role perception. Scully (2005) led the studies on socialisation, questioning the thesis stating that MEPs ‘go native’ during their mandate. In a different vein, Neuhold (2007) looked for mechanisms of socialisation in the Social Affairs and Internal Market committees, understood not as a process of Europeanisation but as a course of internal learning that leads to the formation of a distinct ‘*esprit de corps*’. Recently, there have also been several studies looking at the roles adopted by MEPs during their mandate (Bale & Taggart 2006; Beauvallet & Michon 2010; Navarro 2009; Scully & D. M. Farrell 2003) and at how these roles affect the way they vote and behave inside the EP (Meserve et al. 2009; Blomgren 2003; Scully 1997).

3.2.2.2. *Voting behaviour and political dimensions*

These studies on MEPs roles and behaviour have enhanced our knowledge of the micro-behaviours and micro-foundations of voting behaviour, possibly the most prolific area in the study of the internal workings of the EP. This strand of the literature has focused on the analysis of roll-call votes and, thus, it has been characterised by the use of quantitative (statistical) methods to study voting behaviour (for an exception see, M. K. Rasmussen 2008). Since the mid-1990s, the study of voting behaviour has consistently shown that MEPs do not vote along national (geographical) lines; they position themselves in the left-right dimension (e.g. Hix 1999, 2001; Hix et al. 2007; Roland 2009). This dimension of EP politics applies also to political groups and determines the patterns of coalition formation (e.g. Kreppel & Hix 2003; Kreppel & Tsebelis 1999). Significantly, these patterns have remained stable over time, even with the enlargement to post-Communist countries (Hix & Noury 2009). However, it is important to note that roll-call votes do not exist (or are only very rarely used) in committees, despite most decisions being taken at that level (see above). This caveat resonates with other limitations linked to the use of roll-

call votes, namely whether they reflect a 'normal' or 'median' vote or whether they are used to signal political positions or discrepancies inside or between the groups (Carrubba et al. 2006; Høyland 2010; Thiem 2006). Crespy and Gajewska (2010) underlined these caveats in their study of the Services Directive, where the use of roll-call votes would have obscured the most relevant line of conflict (liberals vs. regulators), which cuts across the left-right and pro-against integration voting dimensions.

3.2.2.3. Forming and shaping the EP's policy preferences

The area of the literature dealing with the internal workings of the EP refers to its policy preferences or policy positions and how they come to exist. Due to the emphasis put on the EP's voting behaviour and the dimensions of politics, this area has been relatively neglected. Some authors have pointed out that it is important to enhance our understanding of how preferences are formed and aggregated, instead of focusing on the outputs displayed during the votes in plenary. Crucial here is the role that committees play not just in organising the everyday life of the EP but also in shaping the direction of its policy preferences. Research done on ENVI (environment committee) showed that the committee was able to shape the policy-agenda and how the nature of the costs and benefits of its amendments had important consequences for the success of the EP's policy preferences (Burns 2005; Collins et al. 1998). Further research also confirmed that ENVI had shifted from being an 'environmental champion' to acquiring a more sympathetic stance towards pro-industry positions (Burns & Carter 2009). Ringe (2009) also underlined that it is necessary to understand how MEPs with more expertise can shape policy preferences inside committees; if these preferences are seen as acceptable, they are usually taken up by the members of their national delegations and political groups who do not possess enough expertise to form their own preferences.

The relative scope of this last strand of EP literature reflects the slow evolution of the scholarship. The analysis of policy preferences requires a thorough understanding of the EP's internal workings, actors and key political dimensions. It is, therefore, only logical that this literature is at its earliest stages. In consequence, this study aims to fill this gap by looking at how the organisational structures and actors of LIBE shaped the policy preferences of the EP in internal security matters.

Conclusion

Despite their clear differences, both the AFSJ and the EP are characterised for their complex journeys from the outskirts of the EU framework to playing a central role within it. In the space of two decades, the AFSJ has come from being a policy area fraught with exceptions and a heavy intergovernmental legacy, to functioning (almost) like any other normal EU policy. In the process, there has been a shift in the collective understanding of internal security matters. EU and domestic actors have become more accustomed to sharing and cooperating at European level, reassessing traditional notions of sovereignty and legitimacy. Although mistrust and flexible forms of cooperation are still characteristic of the AFSJ, the shift in attitudes that has occurred over a relatively short period of time is noteworthy.

However, the advances made at the procedural level, where the objectives of the AFSJ are now legally on a par with classic principles of European integration such as the Single Market or the EMU, might have contributed to reinforcing the security rationale prevailing in this policy area. It seems that more integration has often been synonymous with (or even a driver for) further securitisation. The EU has been used as a venue to escape the control of domestic democratic institutions and the pressure of national media. In a more isolated setting, it has been possible to create tools and discourses that emphasise security over freedom and justice. This process of securitisation has not necessarily led towards a state of emergency or the introduction of exceptional measures, but the idea of a single area of internal security has potentiated the linkage between criminal law, migration and borders. The result is a dominant policy frame that has produced a clear amalgamation of security objects and given a stronger voice to security actors in all shapes and forms, from national authorities to European agencies. This is the accepted rationale that the EP found when it became a co-legislator in 2005; one, as seen above, that it had resisted and contested when it was not allowed to be involved in internal security matters.

In order to understand why the EP had been excluded from participating in the construction of the AFSJ, it is essential to appreciate how the EP has evolved inside the EU institutional structure. The role of the EP has changed radically both in terms of influence and meaning. From a 'talking shop', it has become one of the main EU institutions, co-legislating with the Council in most policy areas. In this sense, the EP has been invested with the responsibility of filling the perceived democratic gap between the EU and its

citizens. This attributed function has served as a legitimising tool for according more powers to the EP, but it has also underlined the misalignment between its new powers and its lack of resonance at the domestic level, especially visible during EP elections.

Despite these caveats, the EP has grown to become an institution similar to most national parliaments. MEPs are organised around political groups that behave and vote in a cohesive manner, clustering around ideological rather than national lines. The EP has also reinforced its committee system, now at the core of its everyday life as well as an essential forum for constructing policy preferences. The centrality of committees as a policy-making venue has led to the reinforcement of certain roles, especially 'relais actors' such as rapporteurs, shadow rapporteurs and group coordinators. The crucial role played by these 'relais actors' implies that MEPs often have more leeway and opportunities to leave their mark on policy outputs in the EP than in other national parliaments. Therefore, given the centrality of committees for internal and inter-institutional relationships, any analysis of policy preferences and legislative processes has to focus on the political dynamics occurring inside these committees. This situates the LIBE committee in a privileged position to understand not only how the EP behaves in the AFSJ but also how it constructs its substantive policy preferences, a crucial process in the new context of co-decision.

Chapter 4: Co-decision in Theories

Introduction

As Chapter three has shown, academic interest on the EP has exponentially grown in the last decade²². The introduction of co-decision is responsible for a significant amount of this growth. The literature on co-decision has developed rapidly, but most of it has taken the shape of formal models of decision-making, interested in the amount of influence that the EP enjoys in inter-institutional relations. Due to their methodology, most of these models have drawn their assumptions from rational-choice institutionalism; thus, the debates have focused more on the shape of the models than on their actual theoretical underpinnings.

The first models were mostly ‘procedural’ models looking at the decision-making stages of the procedures (Garrett 1995; Kasack 2004; Moser 1996; Napel & Widgrén 2006; Selck & Steunenberg 2004; Tsebelis 1995, 1994; Tsebelis & Garrett 2000). These models were criticised for their narrowness and, as a result, a new strand of modelling developed, which used ‘bargaining’ models to look into the stage of preference formation (Hörl et al. 2005; Naurin & Thomson 2009; Schneider et al. 2010; Thomson 2011; Thomson & Hosli 2006; Thomson et al. 2006). This shift underlined the absence of research examining informal bargaining processes. This gap has been filled by the most recent literature on co-decision, which focuses primarily on the importance of early agreements; the creation of informal fora of decision-making (trialogues) (H. Farrell & Héritier 2004; A. Rasmussen 2007, 2011; Shackleton 2000); and crucial role of rapporteurs in shifting the orientation of EP preferences (Benedetto 2005; Costello & Thomson 2010; Hausemer 2006; Høyland 2006; Kaeding 2004; Yordanova 2011; Yoshinaka et al. 2010).

This evolution underlines two characteristics of the current literature on the EP: first, as mentioned, co-decision has been mostly studied through formal models based on

²² Please note that elements of Chapter four have been published in A. Ripoll Servent, 2011. Co-decision in the European Parliament: Comparing Rationalist and Constructivist Explanations of the Returns Directive. *Journal of Contemporary European Research*, 7(1), pp. 3-22; and A. Ripoll Servent, 2011. Playing the Co-Decision Game? Rules’ Changes and Institutional Adaptation at the LIBE Committee. *Journal of European Integration*. Available from: <http://dx.doi.org/10.1080/07036337.2011.566332> [Accessed 4 May 2011].

rationalist approaches; second, research on the EP has become more and more specialised. While this has proved essential for increasing our knowledge of the EP's working methods, some of this literature has become disconnected from wider inter-institutional dynamics. Consequently, there is an absence of theoretical and empirical studies aiming to link the wider inter-institutional relations with the internal politics of the EP.

More generally, most of the existing literature has failed to look into the long-term preferences of the EP. As seen in Chapter three, some authors have examined specific dimensions of voting behaviour (e.g. Hix et al. 2007), while others have only looked at decision-making as one-shot negotiations, with preferences being formed *ad-hoc*. Generally, there is an implicit understanding that policy preferences remain stable over time and organised around broad dimensions such as a left-right axis or pro-against integration (Ringe 2009, 94; Thomson et al. 2004; Tsebelis & Garrett 2000). Chapter three has also shown that, at present, only one study looks not only at EP preferences but also at the change of these preferences over time. Burns and Carter (2009) showed how the introduction of co-decision changed the traditional preferences of the EP's environment committee (ENVI), giving rise to more industry-friendly opinions and shifting the preferences of the committee away from their previous 'green credentials'. This study raised two important points: first, the importance of looking at long-term EP preferences (and not just at voting dimensions), which are often more stable than previously thought; second, the transformative role of institutions (i.e. co-decision) in determining the direction of these policy preferences.

In consequence, this chapter looks at decision-making in the EP, focusing on the two most common procedures in EU legislation, namely consultation and co-decision II (i.e. in its Amsterdam form). Decision-making rules are understood as more than just legal texts; they also shape the institutional context and the behaviour of actors. In consequence, the first section of this chapter looks at consultation and co-decision, their formal rules of procedure, and the patterns of behaviour that can be expected under each of them. The second section uses this procedural framework to develop two models of co-decision that focus on change in the policy preferences of the EP (and thus diverge from existing models of co-decision). The two models seek to enlarge the current knowledge on the transformative role of institutions and therefore use rationalist and constructivist approaches to explain change in policy preferences. The objective is to maximise the

possible explanations for change and look at any similarities or divergences that appear when applying the two models to empirical case studies.

4.1. Decision-making procedures and patterns of behaviour: consultation and co-decision

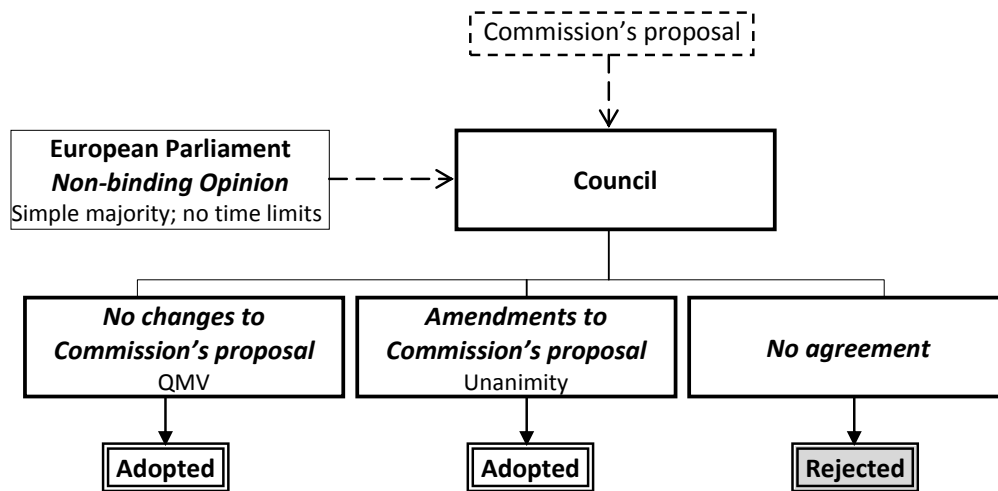
Co-decision, in its current Amsterdam form, has utterly transformed decision-making in the EU. The procedure has not only changed the institutional triangle but also the working methods and institutional culture of the EP (Maurer 2003). More than just a rule of procedure, co-decision has grown to form a new set of norms that guide institutional behaviour (Shackleton & Raunio 2003, 172). This section looks at the evolution of decision-making in the EU, from consultation to co-decision II and examines the contrasting impact that consultation and co-decision has had on the way the EP behaves.

4.1.1. Consultation

Despite the introduction and progressive expansion of co-decision, consultation remained until recently the most frequent procedure in EU decision-making. It was only with the entry into force of the Treaty of Lisbon that consultation lost salience; the Treaty transformed co-decision into the 'ordinary legislative procedure' and mainstreamed areas (such as the AFSJ and agriculture) that had previously functioned mostly under consultation²³.

²³ For a history of the consultation procedure, see (Corbett et al. 2007).

Figure 4.1.: The Consultation Procedure



Source: Author

Figure 4.1. summarises the consultation procedure in terms of inter-institutional powers and voting majorities. Under consultation, power is concentrated in the hands of the Commission and the Council. Decisions are mostly made by the Council, which can accept or modify the Commission's proposal by QMV (or unanimity in a limited number of cases). If the Commission refuses to modify its text in order to include the new amendments, the Council has to reach a unanimous decision to change the text. This procedure gives only a marginal power to the EP, limiting its activity to the submission of a report offering an opinion on the Commission's proposal. The Council has to hear the EP, but it is not constrained by any amendments or proposals included in the EP report. This led most authors to consider that "consultation votes are primarily symbolic" (Carrubba et al. 2006, 695). As a result, most studies on decision-making ignored consultation and concentrated on the co-operation and co-decision procedures (Garrett 1995, 294; Kreppel & Tsebelis 1999, 934; Scully 1997, 235; Varela 2009, 9,10). Consequently, it was assumed that decision-making under consultation took the shape of a "unicameral solution" (Costello 2011, 124) and, subsequently, took only the Commission and Council into account when drawing formal models (Crombez 1996; Tsebelis & Garrett 2000).

Recent studies have come to recognise the importance of consultation and the limited influence that the EP enjoys under the consultation procedure (Kardasheva 2009b; Varela 2009; Yordanova 2009b). Several ECJ rulings extended and solidified two essential EP tools: the 'power of delay' and re-consultation (McCown 2003). In *Isoglucose* (European Court of Justice 1980b, 1980a), the ECJ declared a Council regulation on production quotas

void because the Council had not waited for the EP's opinion before adopting the text. The Court considered that the requirement to consult the EP represented

“an essential factor in the institutional balance intended by the treaty. Although limited, it reflects at community level the fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly” (European Court of Justice 1980b, para. 33).

As a result, the ruling offered the EP a ‘power to delay’; Parliament could use the impatience of the Council to obtain some leverage (Corbett et al. 2007, 208; A. Rasmussen & Toshkov 2011, 93; Varela 2009, 9). It also used this power to put pressure on the Commission (Corbett 1989, 362; Varela 2009). If the Commission did not accept the amendments proposed by the EP, the plenary could decide to reject the Commission's text and ask for a new proposal or it could opt to refer the text back to the leading committee for re-examination (Corbett 1989, 362; Kardasheva 2009b, 387-388; European Parliament 2010b, rule 56). Kardasheva (2009b) showed how the ‘power of delay’ did offer more influence to the EP than was previously shown by formal analyses of decision-making.

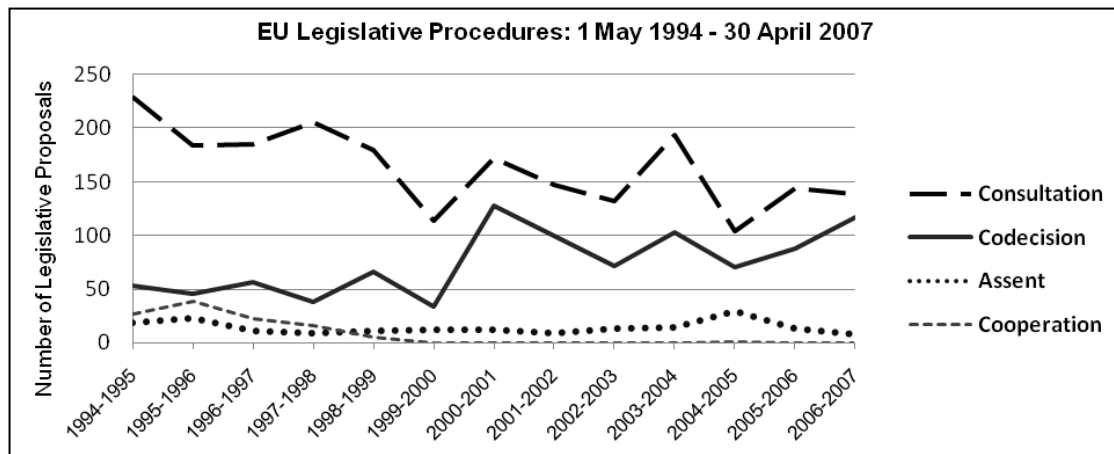
A second group of ECJ rulings (European Court of Justice 1982, 1995) extended the powers of the EP under consultation by granting the EP the right to be re-consulted when the Council introduced modifications to the Commission's text that departed substantially from the original proposal (Corbett 1989, 364-365; McCown 2003). Interestingly, McCown (2003, 988) noted that the failure of the Council to re-consult the EP was often a direct consequence of the ‘power to delay’, especially when the Council was under pressure to reach an outcome. The necessity to re-consult the EP was slowly accepted and codified into inter-institutional agreements regulating the relationships between the EP, the Commission and the Council. For instance, the latest revision of the *Framework Agreement on relations between the European Parliament and the European Commission* explicitly mentions that the Commission

“shall ensure that the Council adheres to the rules developed by the Court of Justice of the European Union requiring Parliament to be reconsulted if the Council substantially amends a Commission proposal. The Commission shall inform Parliament of any reminder to the Council of the need for reconsultation” (European Parliament & European Commission 2010, point 40 [iii]).

Therefore, albeit limited, the consultation procedure did not render the EP completely powerless. This detail is actually very important, since consultation was the

default procedure until the entry into force of the Lisbon Treaty and, in consequence, was traditionally more present in decision-making than any of the other procedure (Varela 2009, 10).

Figure 4.2.: EU Legislative Procedures



Source: Kardasheva (2009a, 16)²⁴

Figure 4.2. clearly shows that, in quantitative terms, despite the growing importance of co-decision, consultation remained, until recently, the main decision-making procedure. The widespread presence of consultation highlights that the study of this procedure should not be overlooked, especially since consultation engendered specific behaviours in both legislative bodies (Council and EP) and shaped the EU policy outcomes.

Table 4.1.: Patterns of Behaviour under Consultation

Patterns of behaviour under consultation		
Inter-institutional relations	EP political groups	Policy outcomes
‘Irresponsible’	Flexible coalitions	Centrifugal

Table 4.1. presents the expected patterns of behaviour that the EP adopts under consultation. In terms of inter-institutional relationships, consultation encourages ‘irresponsibility’, i.e. a free-riding behaviour of both the Council and the EP. Given that the Council is under no obligation to follow the amendments proposed by the EP, both

²⁴ The data were obtained from the European Parliament Legislative Observatory (OEIL). All procedures were taken into account (including, procedures completed, lapsed or withdrawn, and procedures under way). Each period starts on 1 May and ends on 30 April i.e. 01/05/1999 – 30/04/2000, etc. The period pictured runs from 01/05/1994 – 30/04/2007 (Kardasheva 2009a, 16).

institutions are tempted to ignore the position of the other chamber. In those cases where the EP and the Council display contradictory positions, there are no structural factors promoting dialogue and cooperation.

On the one hand, the EP perceives consultation as a process where it is safe to foster conflicts and confrontations, since it will not be held accountable for any policy outcome. In addition, Scully (1997) showed that MEPs participate more in co-decision, because the EP has more influence over the outcomes. Therefore, other MEPs pay less attention to issues discussed under consultation, which offers greater opportunities to individual members (especially rapporteurs) to introduce and push for more extreme positions (Costello & Thomson 2010, 223). Yordanova (2011) also showed that those MEPs who are perceived as being further away from the median legislator (because of their expertise or particular political opinions) tend to secure consultation rather than co-decision reports.

On the other hand, the Council perceives the EP as a hurdle that needs to be overcome. It must be heard but not necessarily listened to and, in effect, the Council has historically ignored the EP's position (Jupille 2004, 48). Varela (2009) pointed out that, in those occasions when the EP had a good idea, the Council was indeed willing to incorporate its amendments into the legislative proposal. However, there is an overall agreement that, under consultation, the EP has the least influence (Häge 2011, 21) and, as a result, the Council enjoys more chances to by-pass the opinion of the EP.

Second, under consultation there is often a lack of stable coalitions, given the relatively low majorities required in the EP – where only a simple majority is necessary to pass a consultation report. Political groups see consultation as a procedure where the political and electoral stakes are lower than under co-decision (Scully 1997, 239). As mentioned above, consultation is similar to a unicameral situation, where the Council can decide alone. Therefore, the EP needs only to find internal coalitions (among the EP political groups) to reach the single majority necessary to pass its report. This situation allows more flexibility to the EP, since the number and shape of feasible coalitions is higher than in a bicameral solution, where the Council's position has to be taken into account (Costello 2011). This enhanced flexibility provides smaller political groups with greater chances to propose amendments and influence the content of the EP report (H. Farrell & Héritier 2004, 1201, 2003a, 592).

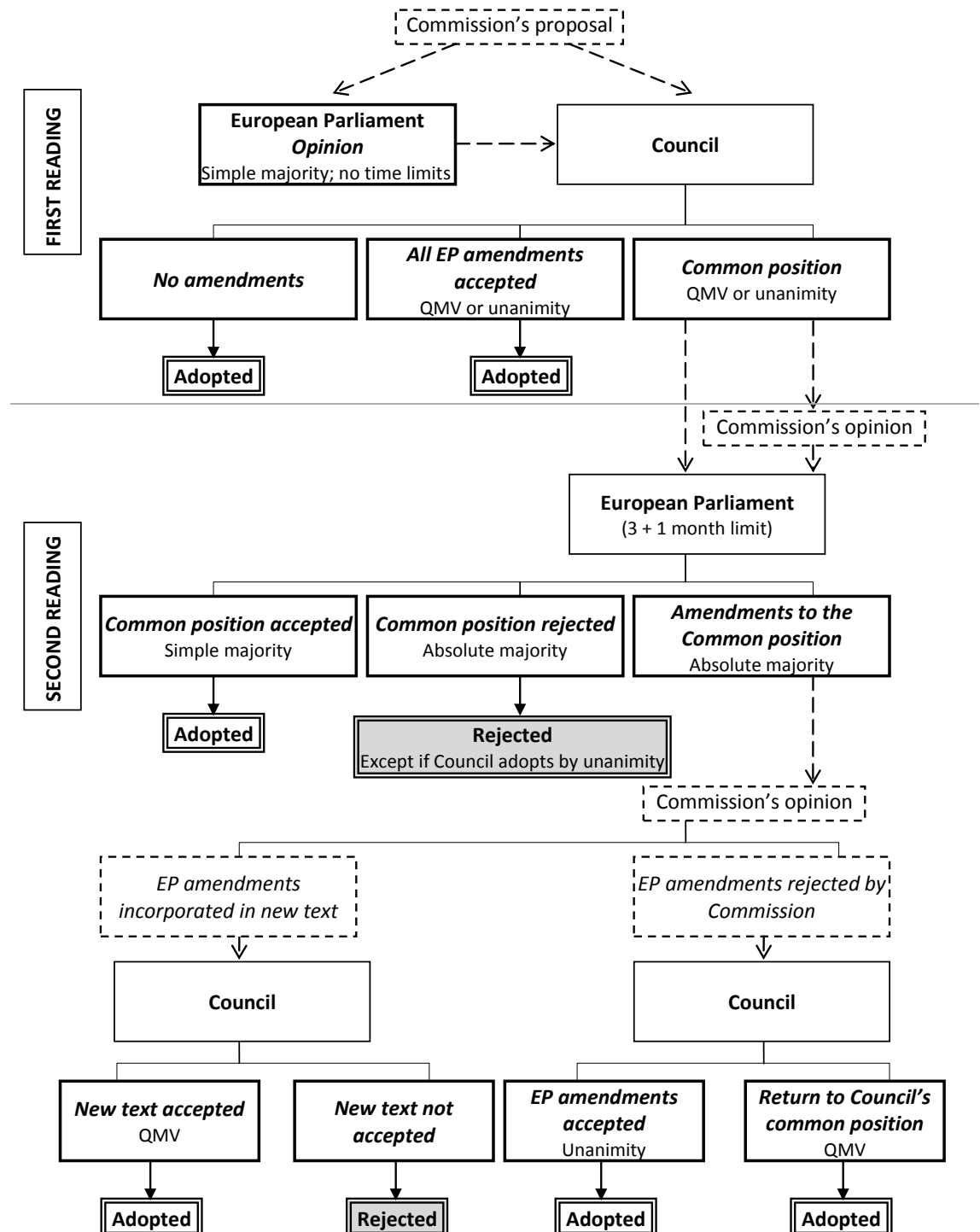
Finally, the participation of smaller groups and the presence of more ‘radical’ rapporteurs widen the ideological range of the EP’s policy preferences. Since these political groups and individual members are mostly situated at the extremes of the left-right dimension (Kreppel & Tsebelis 1999, 956), EP reports under consultation tend to be centrifugal. They contain amendments reflecting a wider range of policy positions that take into account the opinions of both core and peripheral groups. This tendency is reinforced, first, by the perception among policy-makers in the EP that amendments proposed under consultation bear no political consequences and, second, by the idea that negotiations under consultation are a one-off. Given that the EP can only marginally affect the outcomes of negotiations, members treat each proposal in an issue-by-issue manner – except on those occasions when it might help expand the powers of the EP (Hix et al. 2003, 310).

In conclusion, the structure and practices of the consultation procedure have given rise to clear patterns of behaviour. Both Council and EP tend to behave ‘irresponsibly’; the Council does not feel obliged to follow up on the EP’s opinions, while the EP can simply blame the Council for any unsatisfactory or unpopular outcomes. In terms of internal EP politics, consultation acts as a unicameral system; since rapporteurs do not have to take the position of the Council into account, the number of feasible coalitions is higher and provides more flexibility. Finally, this allows for a wider range of opinions and policy alternatives to be included in EP reports, rendering the policies proposed by the EP centrifugal.

4.1.2. Co-decision

The creation of a new co-decision procedure – offering an equal veto power to Council and EP – was a long process of formal treaty changes and informal interpretation of the rules (Hix 2002a; Rittberger 2005). The current form of co-decision (co-decision II as amended by the Treaty of Amsterdam) is a direct successor of the co-operation procedure (introduced by the Single European Act) and the first version of co-decision included in the Treaty of Maastricht. Although the EP had already tested its powers in the budgetary procedure (Priestley 2008), the co-operation procedure was the first step towards the integration of the EP in the legislative decision-making process (Corbett et al. 2007, 214).

Figure 4.3.: The Co-operation Procedure



Source: Author

Figure 4.3. summarises the co-operation procedure, which essentially added a second reading to consultation, giving a chance to the EP to introduce amendments. This possibility sparked a new wave of scholarship, which discussed at length the EP's success

(or lack of it) under the co-operation procedure (see for instance, Hubschmid & Moser 1997; Kreppel 1999; Moser 1997; Tsebelis 1994, 1995; Tsebelis & Garrett 2000). Nevertheless, the introduction of co-decision in the Treaty of Maastricht shifted the focus of attention and over-shadowed the co-operation procedure both in academic and practical terms. Due to the near disappearance of co-operation in EU decision-making, this study will not look into the impact of its rules on the EP's patterns of behaviour²⁵.

The introduction of co-decision in the early 1990s and its modification some years later qualitatively changed the role of the EP in decision-making. With co-decision II (Amsterdam form), the EP gained formally (and symbolically) equal powers to the Council. Figure 4.4. (below) illustrates the main formal steps of the co-decision procedure²⁶. The procedure added a third reading which (after Amsterdam) gave an equal veto power to the EP. After the Conciliation committee, the Council lost the possibility that it had had under co-decision I to re-introduce its common position. In fact, this core change in the formal rules of co-decision was only a formalisation of informal practices that had developed between Maastricht and Amsterdam. When confronted with the re-introduction of a common position of the Council, the EP had consistently rejected the text, informally ending the procedure after the conciliation committee (Crombez et al. 2000; Hix 2002a).

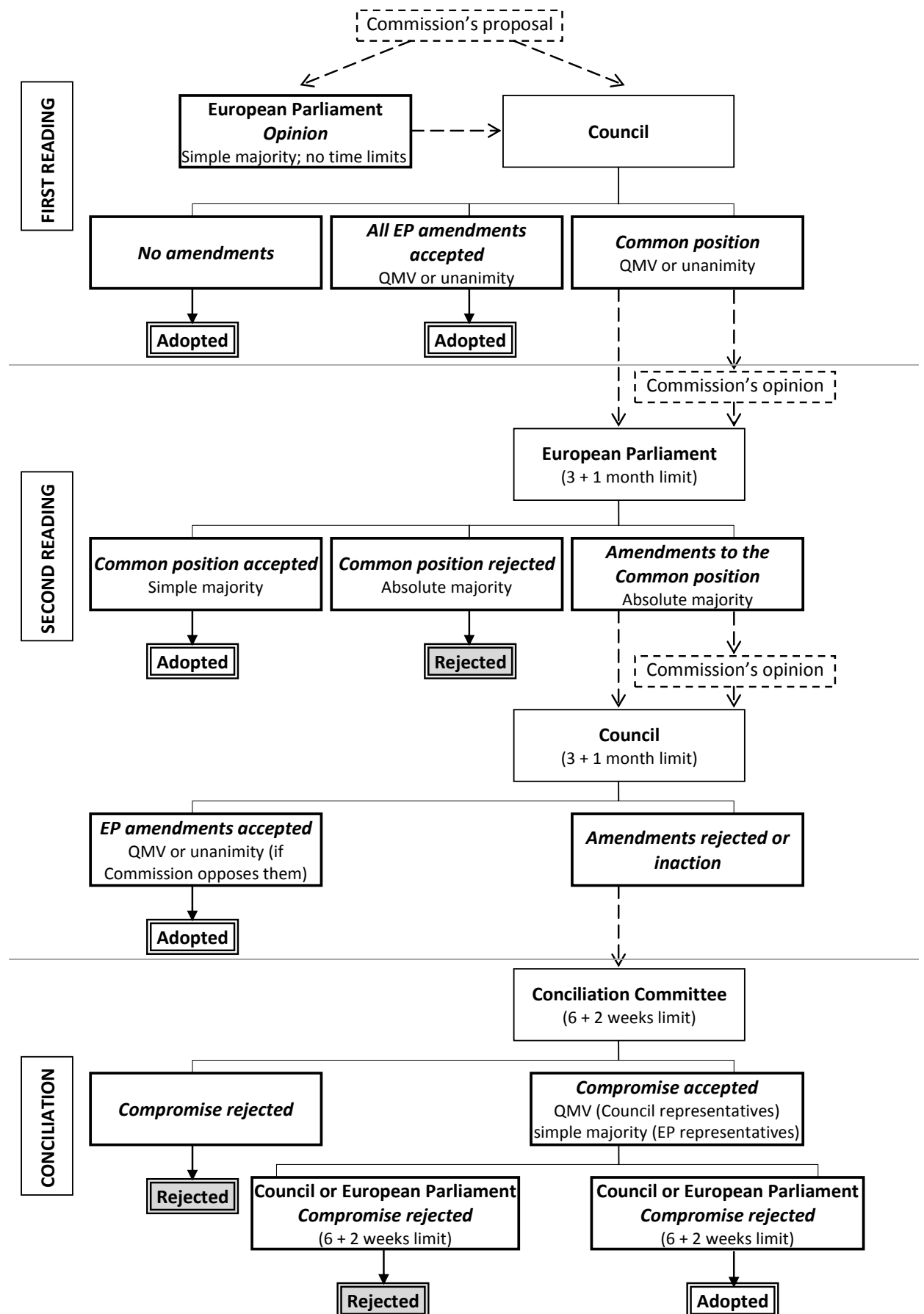
Despite the Amsterdam changes, Hagemann and Høyland (2010) noted that, structurally, the co-decision II procedure is still biased towards the Council. The high majorities in the second-reading stage give an advantage to the Council, since the EP has to find an absolute majority of its members to reject or amend the Council's common position. Given that the EP often struggles to obtain the 369 votes necessary to reach the required majorities²⁷, the Council can be confident that its common position will be adopted (instead of falling back to the *status quo*, i.e. no legislation).

²⁵ Besides, the co-operation procedure was never used in the AFSJ, which consisted mostly of consultation and co-decision dossiers. For further information on the procedure, see (Earnshaw & Judge 1997; Fitzmaurice 1988).

²⁶ For a more detailed explanation of the co-decision procedure (and especially of the conciliation committee), see (Corbett et al. 2007, 214-230).

²⁷ The current chamber (2009-2014) has 736 members. The EP is waiting for the ratification of a requirement introduced by the Lisbon Treaty, whereby the number of MEPs would raise to 754 until the 2014 elections, when it would be reduced to 751 (European Parliament 2010a). With 754 MEPs, the EP would require 378 votes to reach an absolute majority and 376 if it had 751 members.

Figure 4.4.: The Co-decision Procedure



In consequence, the different majorities that the EP needs to amend or reject legislation place significant constraints on its negotiators. If a file reaches the second reading, the EP can only negotiate on those amendments that had already been introduced during the first reading. The rapporteur cannot introduce new amendments, which reduces the flexibility of the procedure (A. Rasmussen 2011, 44). The same constraints exist during the conciliation stage, where the EP negotiating team is also tied by the Parliament delegation, formed of 27 MEPs in charge of giving a mandate for trialogues and overseeing the proceedings (A. Rasmussen 2005; European Parliament 2009a, 18). As it will be shown below, these formal requirements offer strong incentives for the EP to reach an early agreement during the first-reading stage.

Despite these formal caveats of co-decision II, some consider that the procedure has transformed the EU into a fully 'bicameral' system (Costello 2011; Hagemann & Høyland 2010). What is certain is that co-decision has deeply affected the working methods and patterns of behaviour of all the EU's institutions and more specifically of the EP.

Table 4.2.: Patterns of Behaviour under Co-decision

Patterns of behaviour under co-decision		
Inter-institutional relations	EP political groups	Policy outcomes
Consensual	Grand / stable coalitions	Centripetal

Table 4.2. presents the patterns of behaviour that can be expected under co-decision. In inter-institutional terms, co-decision has forced the Council to change its behaviour in order to incorporate the European Parliament into its legislative practices (Corbett et al. 2007, 226). The result has been an overarching norm of consensual behaviour, both inter- and intra-institutionally (Shackleton 2000, 326). As seen above, the relatively high majorities required both in committees and plenary – as well as the need to take the views of the Council into account – have been essential to internalise the need for consensus at the EP, especially if Council and Parliament do not reach an agreement during the first reading. Therefore, a tendency to make greater use of informal channels during negotiations with the Council and the Commission has developed. Informal trialogues bringing a small number of actors together (usually rapporteurs, shadow rapporteurs, and Commission and Council officials, plus the Presidency) are now formed at the very

beginning of the procedure (Settembri & Neuhold 2009, 144) and often seek to find an agreement at the earliest possible stage.

The amount of legislation agreed before the EP's first reading has steadily increased during the last years (European Parliament 2009a). Rasmussen (2007, 5-6) has underlined various reasons for this steep growth, including the greater pressure for efficiency because of the increased workload, the level of political salience, or the need to maintain a good working relationship between legislative bodies. From being a mechanism to avoid the time-consuming and unfruitful conciliation procedure, early agreements have reached the status of normal behaviour under co-decision (Burns & Carter 2009; Shackleton & Raunio 2003).

The development of early agreements has benefited from the absence in the treaties of any time limit imposed on negotiations started before the EP's first reading. Counter-intuitively, this lack of time constraints has proved especially valuable during difficult or sensitive negotiations (Shackleton 2000, 331). It gives time and space to negotiators from each institution to work informally and cast a vote only when they can gather enough support both inside the EP and the Council. This practice shows that the EP has sought to learn the working methods proposed by the Council; by doing so, it has increased its reputation in front of a Council often dubious of the EP's capacity to cooperate and be constructive (Shackleton 2000, 329). This learning process has led the EP to acquire a feeling of shared responsibility – revealed in the use of less conflictual language and more moderate stances in its reports.

The increase in informal negotiations – especially at very early stages – has shifted the importance attributed to different political roles. For instance, committee chairmanships were traditionally regarded as key roles but they are now losing influence in front of rapporteurs and group coordinators (H. Farrell & Héritier 2004), who are now in a better position to access and steer negotiations, thanks to their direct access to information (Yordanova 2009a). More recent research also points at the importance of shadow rapporteurs, who have created the idea of a “negotiating team” inside the EP (Judge & Earnshaw 2011, 68). These changes produce new dynamics of inclusion and exclusion; outsiders to the negotiation process feel they are losing control over the content of agreements (H. Farrell & Héritier 2003b, 11).

At the micro-level, co-decision may be a “poisoned chalice” for those actors playing a role in negotiations, since they need to find a fine balance between steering negotiations and finding the necessary support from political groups (Burns 2006, 247). At the macro-level, the large majorities and the culture of consensus traditionally generated a movement towards the centre in the shape of an informal ‘grand coalition’. Although left-right competition seems to have increased in recent parliaments (Kreppel & Hix 2003), the level of competition remains low – especially during the first stages of negotiations (Settembri & Neuhold 2009, 139,148).

Costello (2011) also underlined that, under a bicameral system, the number of possible winning coalitions decreases drastically and introduces more consistency among coalition partners. However, he also noted that these new dynamics create clearer winners and losers during negotiations. Given the smaller size of winning coalitions, smaller groups are easily brushed aside during negotiations; the EPP and S&D (former PES²⁸) have become the main players of co-decision (H. Farrell & Héritier 2003a, 591). Hausemer (2006, 513) noted that the largest groups enjoy the “tyranny of the majority”, forcing rapporteurs from smaller political groups to find the support of at least one of those largest groups to reach the necessary majority in plenary.

As a direct consequence, co-decision reduces the EP rapporteurs’ room for manoeuvre and leads towards largely centripetal proposals. The necessity to please the other legislative body (as well as the core EP political groups) leaves no space for radicalism (Kreppel & Tsebelis 1999). In fact, Yordanova (2011) showed how, under co-decision, the majority of rapporteurs come from the centre-right of the political spectrum and from bigger groups (which mirrors the coalition dynamics explained above). Besides, she also noted that political coordinators tend to reward those members that are considered to be more moderate and have been loyal in the past. Burns and Carter (2009) argued that the EP even adopts a behaviour of ‘anticipatory compliance’, where informal negotiations help the Parliament predict which amendments might have more chance of success – generally leading to more temperate proposals. Although this kind of behaviour can also be observed in the Council and, especially, the Commission (Burns 2004), it is particularly

²⁸ The Party of European Socialists (PES) changed its name to Group of the Progressive Alliance of Socialists & Democrats (S&D) after the Italian Democratic Party joined the socialist group in the aftermath of the 2009 elections.

interesting to notice it in the EP, which had been used to more confrontational practices and ‘centrifugal’ policy positions.

This institutional constraint intersects with the culture of consensus, creating a feeling of legislative and electoral responsibility in the EP that reduces the scope for political conflict. For instance, Rasmussen (2011, 61) showed how the EP deliberately appoints “rapporteurs who are not under pressure to act irresponsibly because their preferences do not substantially deviate from the EP’s median position”. More responsibility also leads to new relationships between different committees and the EP’s plenary (Burns 2006). As Smith (2008) demonstrated by looking at the case of ENVI, the rise of pro-competitiveness interests in the EP (opposed to the traditional green standards of the committee) diminished the level of deference that the plenary used to show towards the committee.

Co-decision has thus led to the development of very clear patterns of behaviour that largely contrast with those existing under consultation. Its emphasis on consensus has direct implications for the behaviour of political groups and committees as well as for the outcomes of policies. In this sense, understanding these different patterns of behaviour is essential to develop adequate models that explain the change in the policy preferences of the EP. Even if the policy preferences remain the same under consultation and co-decision, the formal and informal patterns of behaviour expected under each decision-making procedure may lead to very different policy outcomes.

4.2. Models of policy preferences’ change under co-decision

As shown above, co-decision has engendered an increasing amount of academic attention in the last decade, but the volume of research has not always brought more clarity. The way co-decision is examined varies greatly, not only between different theoretical perspectives, but even among authors using the same theoretical approach.

Due to its formal structure, decision-making has been studied mostly from a rational-choice perspective. In addition, most authors have examined co-decision – especially inter-institutional relations – through formal models, often using game theory (for a review see Dowding 2000). However, these models have often been criticised for their lack of empirical resonance (Aspinwall & Schneider 2000; Crombez et al. 2000; Judge

& Earnshaw 2008a; Jupille et al. 2003). As seen in Chapter three, other studies examining the internal politics of the EP have focused on voting behaviour, mostly using roll-call votes and thus focusing on the EP plenary as their object of analysis (e.g. Hix et al. 2009; Thomassen et al. 2004).

Given the diversity and different focus of existing research, it is difficult to choose one specific theoretical model to explain decisions made under co-decision, be it rationalist or constructivist. Most authors attempting to contrast or compare institutionalist approaches have opted for adapting their respective assumptions to their dependent variables (Kreppel & Hix 2003; J. Lewis 2003). Using the example of these previous studies, the present chapter builds two models of co-decision based on rational-choice and constructivist assumptions that can explain why the EP modified its policy preferences.

Like Kreppel and Hix (2003), in order to simplify the explanations and use the comparison heuristically, the models will only draw on very schematic assumptions of each theoretical perspective. More complex models may be found for instance in Napel and Widgrén (2006) or Rittberger (2000). However, their understanding of preferences and behaviour are less clear-cut and become closer to constructivist premises (Kreppel & Hix 2003, 79). Therefore, in order to maximise the explanations provided by each institutionalist approach, the models are cut to the bone; this study concentrates on those assumptions and characteristics that may allow us to identify the logics and 'directionality' of change. As seen in Chapter two, when studying policy change, it is important not to concentrate on the shape or quantity of change, but rather on whether changes are cumulative and point towards the same direction (Howlett & Cashore 2009, 41; Nisbet 1972, 40-45; Rittberger 2003).

Unlike previous studies of decision-making, the models developed in this chapter do not focus on either inter-institutional or internal (EP) politics. In order to understand the modification in EP preferences, it is essential to look at both levels to understand how wider inter-institutional relations affect intra-institutional interactions (and the other way round). Similarly, it is also necessary to look inside the 'black box' of the EP in order to understand how policy preferences are aggregated inside the institution. In consequence, the units of analysis are not fixed: the emphasis on collective or individual actors depends on the ontological assumptions of each theoretical approach.

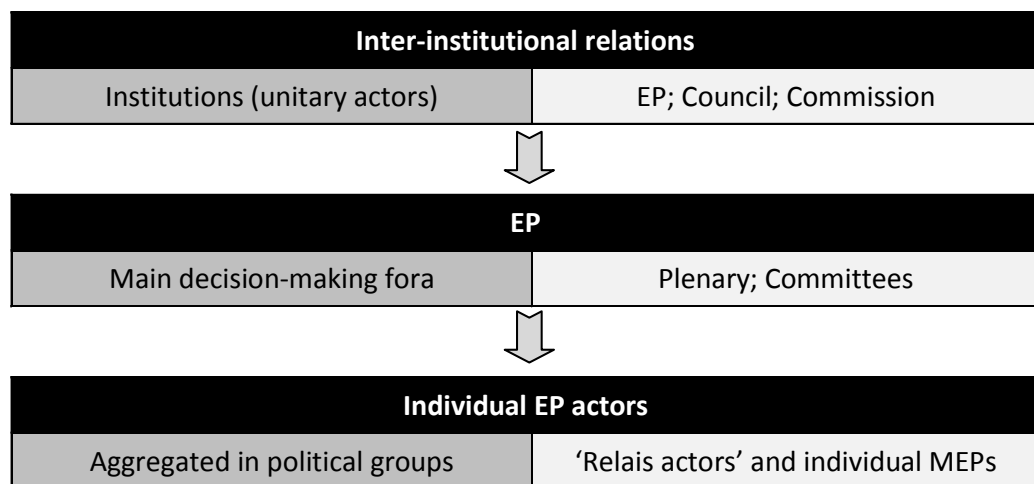
Figure 4.5.: Levels of Analysis

Figure 4.5. shows the different levels of analysis. When focusing on inter-institutional relations, the models look at the three main institutions (EP, Council and Commission); inside the EP, they focus on the plenary level and on committees as the main decision-making fora. As Chapter three demonstrated, committees can be considered the main arena for change in the policy preferences of the EP (Bowler & D. M. Farrell 1995; Burns 2006; McElroy 2006; Neuhold 2001; Ringe 2009; Settembri & Neuhold 2009; Whitaker 2001; Yordanova 2009a). Since most decisions are taken there, this level is the main focus of analysis. However, due to the key role played by specific EP 'relais actors', the models also take into account the behaviour of specific individuals and their political groups when necessary to understand how and why change occurred.

4.2.1. Rational-choice institutionalism: a bargaining model

Several understandings of rational-choice institutionalism exist. Assumptions have become progressively more refined but the main tenet of this theoretical approach is that of "goal-oriented actors operating within institutional constraints" (Thomson et al. 2006, 6). This basic belief of rationalist approaches contains several assumptions related to their ontology, logic of action and preference formation.

Table 4.3.: Rationalist Model

Rationalist model of policy preference change under co-decision	
Ontology	Individualism
Logic of action	Logic of consequentiality
Nature of institutions	Constraining effects
Preference formation	Exogenous
Mechanism	Bargaining

Table 4.3. summarises the main assumptions of rational-choice institutionalism that are at the core of a model of preference change under co-decision. The main characteristic of rationalist approaches is their focus on individual behaviour (Elster 1986, 3; North 1990). Their ontology is primarily individualistic, yet whether actors are individuals or institutions is a secondary issue; collective actors are often anthropomorphised and treated as unitary actors (Jupille et al. 2003, 12-13). In this sense, the focus on individual behaviour of rational-choice institutionalism is a direct legacy of the behaviouralist turn in Political Science after the 1960s (Shepsle 1989; Thomson 2011, 11).

Actors possess private information or knowledge that allows them to interact rationally with other agents (Müller 2004, 399). By doing so, they attempt to maximise their preferences – they calculate the costs and benefits of different options available under the given formal rules (Elster 1986; Knight 1992, 17; Thomson 2011, 8; Riker 1962, 16-28). For instance, Häge and Kaeding (2007, 348) assumed that rational actors functioning under co-decision weight the costs and benefits of conciliation in order to decide whether to accept an ‘early agreement’. Therefore, actors follow a ‘logic of consequentiality’, where their actions are guided by a rational evaluation of future consequences (March & Olsen 1998). In this model, it is assumed that actors are fully rational and possess complete information²⁹.

²⁹ ‘Soft’ rational-choice models assume incomplete information and bounded rationality (Elster 1986; North 1990, 17; A. Rasmussen 2003, 2); however, the basic tenets of rationalism are held here in order to render the differences between the two models more clear-cut.

During the process of cost-benefit calculation, institutions constrain the actions of individuals (North 1990, 4; Thomson 2011, 8); they provide the rules of the game that lead to a 'structure-induced equilibrium', where an alternative becomes the preferred outcome given the specific institutional (procedural) context (Shepsle 1989, 137). In this sense, institutions supply the stability that is necessary to make decisions (Knight 1992, 38). They also provide more information to individual actors and, thereby, influence their power and available choices (Katzenstein et al. 1998, 679). Institutions may modify the cost-benefit calculations of specific actors as well as the strategies to maximise their preferences; however, they do not have an impact on how actors perceive the world or their underlying values and ideas.

In this sense, it is assumed that actors have exogenous preferences – i.e. their preferences are formed outside the EU institutions – and that these preferences do not change substantially during negotiations (Jupille & Caporaso 1999, 432; Knight 1992, 18)³⁰. In the framework of the EU, it is understood that the main objective of political actors is re-election at the domestic level. Therefore, the process of preference formation occurs at that level, i.e. it depends on the domestic political arena rather than on their success inside the EU institutions. In the case of member states, Moravcsik (1993) formulated a liberal-intergovernmentalist approach, in which the process of preference formation was understood as a purely domestic concern: member states aggregate their national preferences on the basis of domestic (economic) concerns and then upload them to the EU level. Therefore, in the Council, member states would try to maximise these domestic preferences but the EU framework would not substantially modify their interests and goals.

In the case of the EP, given the second order nature of EP elections (Eijk & Franklin 1996), it can be assumed that MEPs will ultimately depend on re-election at the national level (Ringe 2009, 94-95). Therefore, if specific members are in a position of influence, they will adopt a national position rather than the position of their party group. Costello and Thomson (2010) showed how, under co-decision, those rapporteurs that tried to bias the contents of EP reports were principally motivated by national interests rather than political groups' views. In addition, it is assumed that MEPs will be first and foremost concerned

³⁰ For more complex understanding of endogenous institutional change from a rational-perspective, see (Greif & Laitin 2004).

with maximising their policy preferences rather than looking for a collective gain in the form of institutional power³¹. Since, under co-decision, the EP enjoys as much influence as the Council in inter-institutional negotiations, there is no need to push for more institutional power; MEPs can concentrate on maximising their policy (substantive) preferences rather than try to increase their institutional (procedural) preferences.

In consequence, rational-choice institutionalism looks at co-decision as a game through which MEPs try to maximise their policy preferences. As explained above (Figure 4.5.), the model looks at different levels of analysis. Given the individualist ontology of rational-choice, the model treats the Council and the EP as individual actors when they negotiate with each other. However, given that the objective of the study is to explain the change of policy preferences in the EP, the model disaggregates the position of the EP and analyses bargaining in committees³². In this sense, it is assumed that MEPs sharing similar preferences and objectives aggregate interests by organising themselves in political groups (Kreppel & Hix 2003, 80; Ringe 2009). These groups represent the left-right ideological spectrum rather than national interests (Hix 2001).³³

It is assumed that preferences are maximised through bargaining, i.e. political groups negotiate and bargain inside the EP in order to form winning coalitions. As seen in the previous section, winning coalitions under co-decision have to take into account both the internal composition of the EP and the possibility to find an agreement with the Council – which reduces considerably the amount of feasible coalitions (Costello 2011). Therefore, the bargaining strength of each actor is crucial to determine the success of coalition-building. Farrell and Héritier (2007b, 233) determined four factors that affect the bargaining strength and the credibility of threats made during negotiations: veto powers; time horizons; ‘sensitivity to failure’; and the ‘justiciability’ of the matter (the ability to bring an issue to the ECJ). These four factors resonate with other models of co-decision drawn by game theorists. As mentioned above, rationalist models have evolved into ‘procedural’ models (which focus on the ‘decision stage’) and ‘bargaining’ models (which

³¹ A strict reading of rational-choice considers that “there do not exist collective desires or collective beliefs” (Elster 1986, 3).

³² Bargaining concentrates on the committee level due to the central role of committees in the decision-making structure of the EP (see Chapter three).

³³ MEPs might dissent from the group line if they consider that an issue has direct implications for their constituency or receive pressure from their national party or government.

look at both formal and informal rules in order to map the ‘influence’ stage) (Naurin & Thomson 2009). In this sense, these two types of models contain very different understandings of the shape that formal procedures take and their impact on how actors construct and maximise their policy preferences. However, both can be useful to expand on each of these factors determining the bargaining strength of actors.

‘Veto powers’ refer to the actions available to actors involved in decision-making that allow them to block or delay legislation (H. Farrell & Héritier 2007b, 236). Here, ‘procedural’ models cast a light on the formal rules that allow actors to maximise preferences by using their capacity to block (or threat to block) decisions. The co-decision procedure offers two specific elements that shape the bargaining strength of the EP. First, co-decision II gives a final veto power to the EP. Given the capacity to reject legislation until the last stage of negotiations, some, like Napel and Widgrén (2006, 132), assume that it is not rational for actors to accept a sub-optimal agreement before they have exhausted the three rounds of negotiation. However, others understand the conciliation procedure as an *ex post* veto that casts a shadow over the whole procedure (Corbett et al. 2007, 227). Hence, the EP can maximise its preferences without the need to exhaust the three readings; the shadow of conciliation – where positions are entrenched and failure close at hand – give the EP an opportunity to set the agenda at earlier stages of the process (Shackleton 2000; Shepsle & Weingast 1987). Second, varying majorities affect the calculation of costs and benefits. As noted in the previous section, the shadow of the absolute majority necessary to reject or amend the Council’s common position during second reading also casts a shadow over first-reading negotiations (Hagemann & Høyland 2010; Naurin & A. Rasmussen 2011, 11; Yordanova 2011, 105). In this sense, if the rapporteur has doubts about his or her actual chances to reach the necessary majority in second reading, there is a strong incentive to reach an agreement at first reading.

‘Procedural’ models also underline the importance of ‘time horizons’. Several authors have looked at the importance of ‘impatience’ to determine the outcomes of formal decision-making processes (Pierson 1996; Rittberger 2000; Shepsle 1989, 144). Impatience makes specific actors weaker because they become more prone to accepting compromises and to sacrificing their policy positions in order to achieve a quick and positive outcome (H. Farrell & Héritier 2007b, 234; Rittberger 2000). In addition, ‘time horizons’ can be very different depending on whether the procedure is considered a ‘one-shot’ game (as most

initial ‘procedural’ models assumed) or as an “infinitely iterated” game (H. Farrell & Héritier 2003a, 579). Dowding (2000, 131) underlined that “the relationship between these institutional actors [EP, Council and Commission] is not a single game, but a series of games over many issues, and bargaining in one game will affect moves in other games”. Therefore, linkages with other on-going negotiations (and future files) affect the capacity of actors to use their veto power in practice.

This is closely related to the next factor, ‘sensitivity to failure’, treated more comprehensively by ‘bargaining’ models. For instance, the bargaining models developed in Thomson et al. (2006, 101-102) showed that, in an ‘iterated’ game, failure to agree is more ‘expensive’ than just returning to the ‘reversion point’ (or *status quo*). If negotiations break down, the bruises of failure will be carried on to the next dossier and diminish trust between actors. As seen in the previous section, trust is essential to maintain the consensual behaviour necessary to reach compromises under co-decision. Therefore, it is assumed that actors will be averse to failure and will try to find an outcome, even if it implies changing or sacrificing their policy preferences. In the case of the EP, the fear of no agreement is amplified by its integrationist bias (Hörl et al. 2005, 594). The preference of the EP to have a European measure rather than no advance in integration leads to the assumption that the EP will favour a sub-optimal outcome rather than no agreement at all (Kreppel & Hix 2003, 81).

The final factor (‘justiciability’ of matters) refers to the possibility to refer conflicts to the ECJ (or threat to do so) (H. Farrell & Héritier 2007b). Since it is an *ex-post* factor that is not directly connected to co-decision, it will be taken into account but given only a secondary role. Consequently, these four factors operationalise bargaining as the main mechanism for policy preference change. These factors explain the changes in the composition and success of coalitions inside the EP when the formal rules of decision-making shift. As it will be shown in each case study, the shift from consultation to co-decision changed the patterns of behaviour and thus the costs and benefits of potential winning coalitions. This change in the feasibility of coalition-building explains the changes in the policy preferences of the EP.

4.2.2. Constructivism: legitimising 'meta-norms' and discursive entrepreneurs

As the previous section has shown, it is not an easy task to draw a model of policy preference change based on rational-choice approaches. The sheer amount of studies (but also their very diverse focus of analysis) makes it necessary to create a theoretical 'patchwork'. Only by assembling these pieces of the jigsaw, is it possible to build a model that fits the purposes of this analysis. However, building a model based on rational-choice institutionalism is a much easier task than creating one based on constructivism. Constructivist studies have mostly focused on the formation of ideas and norms rather than policy-making. The role of EU institutions has been integrated in wider debates around the evolution of EU integration, dealing, for instance, with processes of 'constitutionalization' or European citizenship (Christiansen et al. 1999, 540). However, one can draw on some studies dealing with the Council and the Commission (e.g. Fouilleux et al. 2005; From 2002; J. Lewis 2003, 2005) as well as research undertaken on Europeanisation (Börzel & Risse 2003) in order to conceptualise decision-making and policy change. Some authors have also studied specific aspects of co-decision and the EP, and put an emphasis on the norms of behaviour and informal institutions (e.g. Judge & Earnshaw 2008a; Shackleton 2000; Shackleton & Raunio 2003).

Table 4.4.: Constructivist Model

Constructivist model of policy preference change under co-decision	
Ontology	Holism
Logic of action	Logic of appropriateness
Nature of institutions	Constitutive effects
Preference formation	Endogenous
Mechanism	Discursive entrepreneurship

Table 4.4. summarises the core assumptions of a constructivist model of policy preference change. First of all, constructivism is based on an ontology opposed to that of rationalism. Its ontology understands actors and institutions in a holistic way. Actors and

structures are not fixed elements but instead interact with each other; that is, actors exist in a social context that gives sense to their behaviour and actions. At the same time, social actors can change the meaning and functions of structures (Wendt 1987). Consequently, individuals cannot be analysed as independent actors aiming to achieve their own interests, instead they have to be considered as parts of a larger structure. In this sense, it is possible to include more complex understandings of institutions in analyses of decision-making, namely not as individual units but as holistic structures showing some collective rationality (J. Lewis 2003, 106).

Second, actors do not aim to maximise their own preferences by calculating costs and benefits and evaluating the possible consequences of their actions, but behave in a normative context that shapes their behaviour by indicating what is considered appropriate. The 'logic of appropriateness' (March & Olsen 1989) renders unacceptable some actions that might be considered rational in the given normative context; therefore, they become unfeasible in practice. As seen in the previous section, co-decision creates very specific patterns of behaviour. Crucially, the necessity to find compromise emphasises a norm of consensus – both inter- and intra-institutionally (Shackleton 2000, 326). Inside the EP, the high majorities required both in committees and plenary (especially if Council and Parliament do not reach an agreement during the first reading) have been essential in internalising the need for consensus.

The idea of consensus as an overarching standard of appropriate behaviour has had clear transformative effects. The necessity to reach inter-institutional compromises has increased the use of informal negotiation channels. Informal dialogues are the clearest example of such informal fora. As seen above, dialogues bring a small number of actors together – usually rapporteurs, shadow rapporteurs, Commission and Council officials, plus the Presidency – and are now formed at the very beginning of the procedure (Settembri & Neuhold 2009, 144). They facilitate dialogue and compromise-finding among a reduced number of negotiators, which makes it easier to find agreements at the earliest possible stages (H. Farrell & Héritier 2004; A. Rasmussen 2007). Therefore, a constructivist model of policy preference change assumes that actors might prefer to achieve a sub-optimal result rather than break the norm of consensus; a failure in negotiations is perceived as a rupture of the appropriate behaviour expected from all the EU institutions.

This assumption is supported by the actual practices of institutions. During the last parliamentary term (2004-2009), 72 per cent of co-decision procedures were agreed at first reading while only five per cent reached the third reading (conciliation) and none failed. This supposed a steep increase in the use of early agreements. During the previous term (1999-2004), 28 per cent of decisions had been reached at first readings, while 22 per cent were agreed in conciliation (European Parliament 2009a, 14). These figures show that there is a clear preference for avoiding conciliation, which is seen as a failure to co-operate effectively within the 'rules of engagement' developed under co-decision (Shackleton 2000; Shackleton & Raunio 2003).

In comparison with the understanding of institutions held by rational-choice institutionalism – where institutions are only intervening variables constraining the behaviour of actors –, constructivism understands institutions in a broader way. In fact, the designation of the EP, Council and Commission as 'institutions' is often misleading; they are not institutions but organisations (Stacey & Rittberger 2003, 890). Institutions are defined as "sets of rules that structure interactions among actors" (Knight 1992, 3), but can also comprise "symbol systems, cognitive scripts, and moral templates that provide the 'frames of meaning' guiding human action" (Hall & Taylor 1996, 947). In addition, institutions do not just intervene in the behaviour of actors by constraining their choices and strategies but have a transformative effect (Checkel 2001a; Olsen & March 2004, 11). They can affect the behaviour of actors and transform their preferences and beliefs systems.

In this institutional framework, actors develop preferences that are not just given by exogenous interests but respond to the social context in which they are embedded. In this sense, preferences are endogenous and can be affected by wider norms of behaviour that enhance or foreclose certain actions or strategies. Institutional norms can act as cognitive and strategic guides of behaviour by highlighting the relevant elements when making a decision and providing legitimacy to political action (Dimitrakopoulos 2005, 678). Constructivism also foresees the possibility of understanding preferences beyond the purely individual interest level. In this sense, it envisages the formation of collective purposes (Ruggie 1998, 33). This is particularly important in the case of the EP, where collective institutional preferences can be distinguished from those of specific MEPs or political groups.

In consequence, institutions can develop a set of legitimising tools or ‘meta-norms’ (Thomas 2009). In the case of the EU, these ‘meta-norms’ are organised around substantive and procedural (or functional) questions (Maurer & Parkes 2007; Thomas 2009). The AFSJ has developed very particular ‘meta-norms’. In terms of substance, there is a shared understanding that the EU should protect and serve EU citizens (Kostakopoulou 2000, 507-508). At the same time, in procedural terms, the EU (particularly the Commission and the EP) also strives for more integration and further cooperation among member states (Kaunert 2005; Kaunert & Léonard 2010). These meta-norms are the yardsticks that help actors evaluate whether a particular policy position or action is perceived as an acceptable and legitimate option.

A constructivist perspective provides a broader definition of legitimacy and legitimate actions than commonly understood in the EU. Legitimacy can be defined as

“a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions” (Suchman 1995, 574).

Consequently, the main mechanism to change the policy preferences of the EP looks at discursive practices aiming to reconcile specific policy preferences with wider meta-norms perceived as the legitimate course of action (Béland 2009). In this sense, “[d]iscourse is not only what you say (...), it includes to whom you say it, how, why, and where in the process of policy construction” (Schmidt 2008, 310). Discursive ‘entrepreneurs’ (Finnemore & Sikkink 1998; Fligstein 2001) will try to convince those that promote a policy option opposed to the legitimate ‘meta-norms’ of the necessity to change their policy preferences. In consequence, specific actors – usually MEPs, speaking generally through political groups – use discourse to present an alternative policy option as a more legitimate solution by underlining its resonance with the norms and values promoted by the broader institutional context (Béland 2009; Schmidt & Radaelli 2004).

In conclusion, a constructivist model of co-decision proposes a different understanding of policy preference change. Concentrating on substantive and procedural ‘meta-norms’, it examines processes of discursive entrepreneurship that aim to replace the traditional policy preferences with an alternative solution that is perceived as more legitimate within the predominant institutional context.

Conclusion

This chapter built on the previous theoretical and empirical overviews to develop two models of policy preference change under co-decision. In order to contextualise the decision-making process, the first part of the chapter analysed the evolution of decision-making in the EU. The aim was to gain a better understanding of formal rules of procedure but also to map the impact that these different rules have had on the way the EP behaves and how it reaches decisions. As shown in this chapter, consultation and co-decision resulted in particular (and often contradictory) patterns of institutional behaviour. Consultation created incentives to behave 'irresponsibly' in inter-institutional negotiations because its formal rules did not foresee any mechanisms to facilitate consensus. Furthermore, the lower majorities in the EP and the unicameral shape of the procedure meant that the dynamics in coalition-building were more flexible. In consequence, political parties and individual MEPs (especially rapporteurs) had a better chance to introduce more radical and centrifugal policy preferences.

In comparison, co-decision has turned the tables and led to more consensual patterns of behaviour. The need to co-legislate has led the EP and the Council to find methods that help them build compromises. The shadow of conciliation and second reading has underlined the necessity to reach agreement at an early stage of the procedure and given rise to informal fora such as trialogue meetings. In addition, the higher EP majorities (especially in second reading and conciliation) and bicameral system have reduced the number of feasible coalitions, since compromises need to please enough MEPs in the EP to allow them to reach a winning coalition and the necessary member states to reach QMV in the Council. As a direct result, the scope of policy outcomes has also been reduced and compromises are now more centripetal, their options are situated around the centre of the ideological (policy) spectrum.

These patterns of behaviour have underlined that formal rules are not procedurally neutral. They have a transformative power that shape behaviour and affects the outcomes of decision-making. Taking this into account, two models of co-decision have been developed in order to maximise the explanations for policy preference change. The models are based on rationalist and constructivist assumptions and draw on the institutionalist approaches presented in Chapter two. The rational-choice institutionalist model emphasises institutions as constraints on the individual behaviour of actors and their

capacity to maximise their preferences. In this sense, it concentrates on bargaining as the key mechanism to explain the change in the policy preferences of the EP. These preferences change when past coalition-dynamics become unfeasible under co-decision, given the particular patterns of behaviour that it produces. The necessity to find compromise under a bicameral system pushes for new coalition dynamics, often changing and reducing the number of political groups that make a winning coalition possible.

In contrast, the constructivist model of co-decision looks at the mutual constitution of institutions and actors to understand the process of policy change. In this sense, institutions are understood in a broader way; they are composed of substantive and procedural 'meta-norms' that limit the amount of possible outcomes. Only those preferences that fit with these wider 'meta-norms' will be perceived as legitimate. In consequence, this model emphasises a mechanism of discursive entrepreneurship, whereby specific entrepreneurs attempt to transform the existing policy preferences with alternative options that are considered as more legitimate because they resonate better with these institutional 'meta-norms'.

In conclusion, the two models attempt to reduce the number of assumptions to the strict minimum to make a comparison between the two approaches heuristic and feasible. The objective is to apply each model to the three case studies in order to maximise the number of possible explanations. Furthermore, the use of models should also help to identify those elements of friction and similarity between the two theoretical explanations. A comparison of these elements might help to draw further conclusions on the conditions and drivers for change. As mentioned previously, change is not only a single occurrence but an aggregation of instances and frictions. Consequently, it is essential to identify not only the instances when change occurs but also its 'directionality'. The following three chapters turn to the empirical analysis of these two models of decision-making, using them to maximise the number of explanations for each case study.

Chapter 5: The ‘Data Retention’ Directive

Introduction

In 2005, the ‘Data retention’ directive (European Parliament & Council of the European Union 2006) caused surprise among data protection advocates, who blamed the European Parliament (EP) for “cav[ing] in to Council pressure” (Euractiv 2005a)³⁴. The directive allows member states to access traffic and location data resulting from electronic communications for the purpose of investigating, detecting and prosecuting serious criminal offences. In practice, this means that national authorities can store data for law enforcement purposes – whether they are suspected of having committed a crime or not. In consequence, the directive contradicts the high data protection standards that the EP had persistently asked for.

The outcome of the directive was especially surprising because the directive had been identified as the first text on data protection and internal security matters decided by both the Council and the EP after the transitional period established by the Treaty of Amsterdam ended in 2005. Given that the EP had, until then, portrayed itself as a clear advocate of human rights and civil liberties, such an outcome was seen as a major U-turn in its position (Hosein [Privacy International] et al. 2005). The ‘Data retention’ directive went against such expectations; the text had a restrictive nature and left wide room for manoeuvre to member states (Peers 2005). The blame was especially put on the LIBE committee – previously the most combative actor in favour of data protection among the different EU decision-making institutions.

Thus, this chapter aims to explain how and why the EP agreed to a text that was apparently opposed to its traditional policy preferences, i.e. why, instead of pushing for a more liberal understanding of data protection, it accepted a text that allowed member states to store and access telecommunications data without much control. The first section of the chapter introduces the content of the directive and describes what happened during

³⁴ Please note that elements of Chapter six have been published in A. Ripoll Servent, 2009. Setting Priorities: Functional and Substantive Dimensions of Irregular Immigration and Data Protection under Co-decision. *Journal of Contemporary European Research*, 5(2), pp.225-242.

the negotiation process. The second section looks at the impact that the modification in the decision-making procedure had on the change of preferences from a rationalist understanding of co-decision, while the third section focus on constructivist explanations for change.

5.1. Negotiating the ‘Data retention’ directive

The ‘Data retention’ directive is the latest stop in a long journey aiming to regulate telecommunications data in the EU. The directive had first been proposed as a third-pillar instrument by France, Ireland, Sweden and the UK (Council of the European Union 2004b), but the proposal had faced the opposition of the Commission, who argued that the categories of data covered by the proposal affected first-pillar competences. In September 2005, the Commission issued a new first-pillar proposal falling under Article 95 TEC³⁵, transforming the instrument into a single market measure. Despite the nominal change in its legal basis, in practice the proposal continued to be treated as an internal security measure. However, Article 95 did force a change in the decision-making rules; due to the new legal basis, the directive fell now under co-decision.

Since the change in decision-making rules occurred around the same time as the end of the transitional period set by the Treaty of Amsterdam, the directive was identified as the first opportunity for the EP to co-legislate on issues of terrorism and data protection. The fact that the directive continued to be negotiated by the LIBE committee enhanced the link made between data retention and internal security. As a result, negotiations were dominated by two themes: on the one hand, substantive issues around the necessity and extent of data retention and, on the other hand, the appropriate legal basis for the instrument. These two issues were already present during the first discussions on the necessity to allow national authorities to store communications data, back in the late 1990s.

In 1997, a directive had been passed on *Data Protection in the Telecommunications Sector* (European Parliament & Council of the European Union 1998). The objective of this instrument was to avoid the storage of data except for billing purposes – that is in order to

³⁵ Article 95 of the Treaty establishing the European Community (TEC) covers “measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market”.

protect customers. However, from 1998, the Council discussed the types of data available to law enforcement authorities and pointed out that it was necessary for them to ensure access to and retain telecommunications data (Statewatch 2001). As a result, the revision made in 2002 to the 1997 directive allowed member states to introduce a new provision that provided a greater degree of flexibility to member states, which could now extend the scope and purpose of the directive as they pleased. This new provision (Article 15.1) stated that

“Member States may adopt legislative measures to restrict the scope of the rights and obligations provided for in Article 5 [confidentiality of communications], Article 6 [traffic data], Article 8(1), (2), (3) and (4) [caller ID], and Article 9 [location] of this Directive when such restriction constitutes a necessary, appropriate and proportionate measure within a democratic society to safeguard national security (i.e. State security), defence, public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system [...]. To this end, Member States may, inter alia, adopt legislative measures providing for the retention of data for a limited period [...]” (European Parliament & Council of the European Union 2002).

The 2002 directive had been negotiated under co-decision, giving the EP the chance to have a full say on the content of the text. Therefore, the introduction of this provision caused surprise among data protection advocates because, by compromising its traditional liberal positions, the EP behaved against all expectations (Global Internet Liberty Campaign 2002). The result ought to be understood by examining internal EP politics. In a disputed decision-making process, the LIBE committee report – which proposed going to a conciliation procedure – was by-passed by the two larger political groups. EPP-ED and PES negotiated an agreement with the Council in order to reach a second-reading agreement. By doing so, they dismissed the doubts raised by the LIBE committee in relation to data retention and accepted the inclusion of the new Article 15.1 (Statewatch 2002b). This led the rapporteur (ALDE Italian MEP, Marco Cappato) to withdraw his name from the report as an act of protest³⁶. In this sense, by bypassing the LIBE committee on this occasion, the leaders of the larger EP political groups set a precedent for future negotiations on data retention. They also legitimised the possibility to give member states a high level of flexibility, which would prove essential for the ‘Data retention’ directive.

³⁶ ALDE political advisor A, interview, March 2011.

In August 2002, Belgium submitted a new confidential proposal for a *Draft Framework Decision on the retention of traffic data and on access to this data in connection with criminal investigations and prosecutions* (Statewatch 2002a, 2004). The criticisms received after the vote on the 2002 directive made it difficult for Denmark – holding the presidency during the second half of 2002 – to discuss the Belgian text without adding fuel to the fire. Therefore, the idea of regulating data retention was not raised again until the aftermath of the Madrid bombings in March 2004. On that occasion, the Framework Decision proposed by France, Ireland, Sweden and the UK, on 28 April 2004, was based on Articles 31.1.c and 34.2.b of Treaty on European Union (TEU) dealing with judicial cooperation in criminal matters. Rapidly, negotiations confronted two stumbling blocks. On the one hand, data protection authorities raised repeated concerns about the compatibility of data retention with Article 8 of the European Convention on Human Rights (ECHR) – dealing with the right to privacy (Article 29 Data Protection Working Party 2004). Such concerns were embraced by the LIBE committee in its opinion on the Framework Decision (European Parliament 2005b).

On the other hand, the Commission expressed, from the onset, reservations about the legal basis of the proposal. In March 2005, it issued a legal opinion where it confirmed the necessity to develop a data retention instrument under the first pillar. The existence of the 2002 directive and the requirement for private companies to store telecommunications data was at the core of the Commission's support for a first-pillar instrument (European Commission 2005a). As a result, in September 2005, the Commission issued a new proposal in the form of a directive (European Commission 2005b). The EP supported the move, since a first-pillar text gave it the right to co-decide with the Council. Nevertheless, it is important to underline that the Commission's proposal integrated the core of the Council's proposals; the most notable modifications affected institutional issues – such as the evaluation procedure (comitology) – rather than substantial ones.

During the second half of 2005, the British presidency decided to continue parallel negotiations for the two documents (i.e. the first-pillar proposal for a directive and the third-pillar Framework Decision). After the bomb attacks in London of July 2005, the British government wanted to ensure that an agreement would be reached³⁷. It also knew

³⁷ EPP staff, interview, March 2011.

that the EP would want to come across as an active actor in counter-terrorism³⁸; the EP is, after all, responsible for representing and protecting the interests of EU citizens. Thus, the British presidency continued to negotiate the third-pillar text inside the Council but also started to talk to the EP. The main objective was to have an agreement – be it under the third or the first pillar – before the end of the presidency in December 2005 (Clarke 2005). In fact, due to the domestic political pressure felt by the British presidency, UK Home Secretary, Charles Clarke pushed for a first-pillar text, since he knew that (due to the sensitive nature of the discussions) a third-pillar text could easily be blocked in Council (where unanimity was required)³⁹. This aspiration set a very quick pace to negotiations with the EP, which finished in less than three months.

Firstly, because the file was deemed very sensitive, a working group was created in LIBE to try to create as much support as possible. The working group was formed by Alexander Alvaro (the German ALDE rapporteur for data retention); Martine Roure (PES MEP and rapporteur for the third pillar framework decision on data protection); Jean-Marie Cavada (ALDE MEP and LIBE Chairman); and the shadow rapporteurs for data retention. In mid-October, the EP Conference of Presidents gave a mandate to the rapporteur to find an agreement⁴⁰. With the help of a quick succession of dialogues, on 22 November 2005 an inter-institutional agreement was found with the rapporteur⁴¹. Alvaro submitted the proposal to the LIBE committee, where it received a large support (33 MEPs in favour, 8 against and 5 abstentions). However, the LIBE agreement was not accepted by the EP at plenary level, which voted against it and decided to submit to the vote an alternative compromise amendment proposed by the EPP-ED and PES. Therefore, the 2002 scenario was repeated: the rapporteur's proposal was by-passed and replaced by an alternative compromise proposal drafted by the two largest political groups.

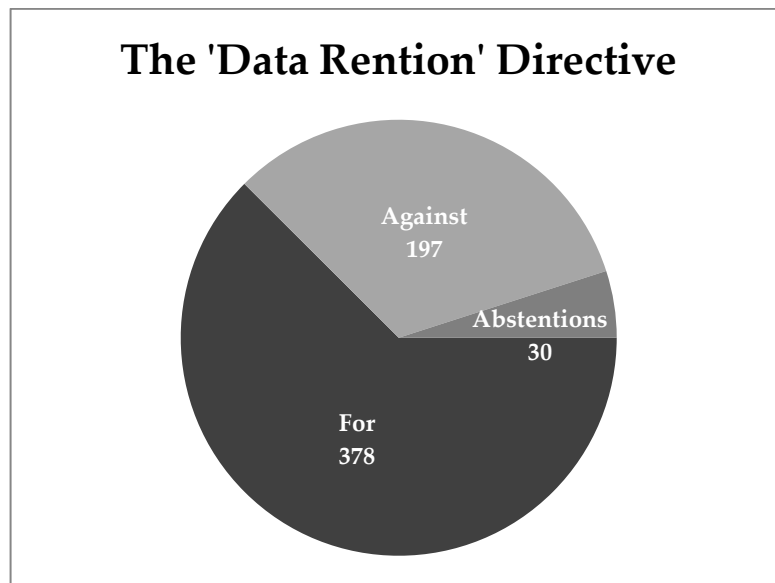
³⁸ S&D political advisor, interview, March 2011.

³⁹ EPP staff and S&D political advisor, interviews, March 2011.

⁴⁰ EP official B, interview, March 2010.

⁴¹ Ibid.

Figure 5.1.: Results of Plenary Vote



Source: Adapted from Votewatch (2005)

Figure 5.1. shows the composition of the final vote on 14 December 2005 at the plenary level. The text was passed with 378 votes in favour, 197 against and 30 abstentions. Table 5.1., below, disaggregates the votes by political group and national delegation.

Table 5.1.: Disaggregation of Votes (Data retention)

	For	Against	Abstention
ALDE			
Cohesion: 35.07%	25	38	4
Austria		1	
Belgium	5		
Cyprus		1	
Denmark	1		3
Estonia		2	
Finland		1	
France	5		
Germany		6	
Hungary		1	
Ireland		1	
Italy	8	3	
Latvia	1		
Lithuania	4	1	1
Netherlands		4	
Poland	1	1	
Slovenia		2	
Spain		2	

Sweden		2	
UK		10	

	For	Against	Abstention
Greens/EFA Cohesion: 95.83%	0	35	1
Austria		2	
Belgium		1	1
Denmark		1	
Finland		1	
France		4	
Germany		12	
Italy		2	
Latvia		1	
Luxembourg		1	
Netherlands		4	
Spain		3	
Sweden		1	
UK		2	

	For	Against	Abstention
GUE/NGL Cohesion: 100%	0	28	0
Cyprus		2	
Czech Republic		4	
Finland		1	
France		3	
Germany		4	
Greece		1	
Ireland		1	
Italy		5	
Netherlands		1	
Portugal		3	
Spain		1	
Sweden		1	
UK		1	

	For	Against	Abstention
IND/DEM Cohesion: 87.5%	2	22	0
Czech Republic		1	
Denmark		1	
Greece		1	
Netherlands		2	
Poland	2	7	

Sweden		3	
UK		7	

	For	Against	Abstention
EPP-ED Cohesion: 67.76%	179	39	10
Austria	5		
Belgium	5		
Cyprus		2	1
Czech Republic	7	6	
Estonia	1		
Finland	1	3	
France	15		
Germany	41	2	
Greece	4	5	1
Hungary	9		2
Italy	19		
Ireland	1	1	3
Latvia	1	1	
Lithuania	1	1	
Luxembourg	1		
Malta	2		
Netherlands	5		
Poland	13		1
Portugal	8		
Slovakia	1	4	2
Slovenia	3		
Spain	22		
Sweden		4	
UK	14	10	

	For	Against	Abstention
PES Cohesion: 77.3%	146	24	2
Austria	5	2	
Belgium	6		
Czech Republic	2		
Denmark	5		
Estonia		2	
Finland		1	
France	24	1	1
Germany	19	1	
Greece		7	
Hungary	5		1
Italy	12	1	

Ireland	1		
Lithuania		1	
Luxembourg	1		
Malta	3		
Netherlands	1	5	
Poland	7	2	
Portugal	10		
Slovakia	2	1	
Slovenia	1		
Spain	21		
Sweden	4		
UK	17		

	For	Against	Abstention
UEN Cohesion: 58%	18	2	5
Denmark	1		
Ireland			3
Italy	8		1
Latvia	3		1
Lithuania		2	
Poland	6		

	For	Against	Abstention
NI (Non-Attached) Cohesion: 4%	8	9	8
Austria		1	1
Czech Republic		1	
France			4
Italy	4	1	1
Poland	4		
Slovakia		1	2
UK		5	

Source: (Votewatch 2005)

As Table 5.1. shows, the winning coalition was formed by a grand coalition with EPP-ED and PES at its core and an ancillary support of the Union for Europe of the Nations group (UEN) and some sections of ALDE (mostly its Italian, Belgian and French delegations, which voted along national lines, as well as the Lithuanian delegation). In comparison, 197 MEPs voted against the directive. This group was comprised by half of ALDE; the vast majority of the Independence/Democracy (IND/DEM) group as well as the

entirety of Greens/EFA (European Free Alliance, regionalists) and the European United Left-Nordic Green Left (GUE-NGL, radical left). The 30 abstentions were broadly distributed among most of the groups. Interestingly, large sections of British MEPs voted against the directive, probably because those coming from parties in the opposition at the national level saw the directive as an attempt to reintroduce a proposal that had been voted down by the British parliament (Batten in European Parliament 2005a).

In general, the outcome of the directive made the EP appear to be a “sell-out” (Peers 2005, 1). In the confrontation between civil liberties and security, many considered that the “need of the law enforcement agencies [had] prevailed” (Nettleton & Watts 2006, 75). If one compares the Alvaro report to the final text, it is easy to see where the conservative and socialist leaders gave in to the wishes of the Council. The EP managed to secure only one main point under discussion, namely the exclusion of ‘prevention’ from the purposes of the directive. The directive was eventually limited to the ‘investigation, detection and prosecution’ of serious crime (Article 1). However, the possibility to use ‘prevention’ as a reason for retaining data had already been deleted from the third-pillar Framework Decision in October 2004 (Council of the European Union 2004b). Therefore, the deletion did not come only as a result of the pressure exerted by the EP; a majority of member states also preferred to leave it outside the framework of the directive.

Similarly, the LIBE committee wished to restrict the types of crime covered by the directive. The Commission’s proposal referred only to ‘serious crime’ but did not give a precise definition of the term; it merely put an emphasis on terrorism and organised crime. Consequently, the LIBE committee insisted on defining ‘serious crime’ as those acts included in the European Arrest Warrant (Council of the European Union 2002a, Article 2.2.). The Council, on the other hand, played with the idea of widening its scope to all types of crime. In the end, the compromise text settled on ‘serious crime’, but left any precise definition to national law (Article 1). However, this solution has to be understood in the light of Article 11, which allows member states to use the 2002 *Directive on electronic communications* to widen the scope of the directive. As seen above, Article 15.1. of the 2002 Directive foresees that member states can retain data for less serious crime and with the purpose to prevent criminal acts. Since the 2005 Directive only takes precedence in the cases established by Article 11 (i.e. in cases of serious crime and excluding the prevention

of criminal acts from its scope), the 2002 Directive could still be used by member states to modify the purpose and scope of data retention for less serious crime (Peers 2005, 5).

Equally, Article 11 could also be used to widen the types of retained data by making use of the 2002 Directive, which includes more types (for example, web browsing) than the 2005 Directive. The latter restricts the compulsory retention of traffic data on fixed and mobile telephony; internet access; e-mail; and IP telephony. Article 5 specifies the categories of information to be retained (e.g. source and destination, date, type, equipment, etc.). The final compromise also included data on unsuccessful calls (only to be retained if they are anyway stored or logged by the company [Article 3.2.]), which clearly went against the will of the LIBE committee. Similarly, the compromise agreement stated that all information on the location of mobile data should be retained. This means that location is recorded not only at the start of the communication but for its entire duration (Article 5.f.2). More generally, it is important to underline that, although the directive precludes the storage of content data (i.e. data with specific information on what is communicated), some consider that it might prove relatively easy to infer the content by simply processing and linking the information included in all these categories (Kosta & Valcke 2006).

As for the duration of retention, the final result foresees longer periods and more flexibility than what was proposed in the EP report or the Commission's initial text. Article 6 allows for a period of retention that spans between 6 and 24 months. Moreover, Article 12 allows for extra retention periods, which may be inserted in national legislation if authorised by the Commission. It is important to note that Article 12 goes beyond the exemptions allowed by Article 95.4. TEC, which contemplates the possibility that member states keep existing national legislation that surpasses standards harmonised at EU level. In comparison to Article 95.4. TEC, Article 12 not only allows keeping exceptions in existing national legislation but also foresees exemptions for *future* legislation, thus allowing a higher level of flexibility for member states.

The EP also missed on the opportunity to restrict who can have access to retained data and the purposes of their access to this data. The EP report (European Parliament 2005b) foresaw that only judicial authorities would be allowed to access information – and they would have to provide a justification for the request. In the final text, Article 4 only mentions the 'competent national authorities' as defined by national law. Here again, flexibility and discretion are at the core of the directive.

To sum up, by sidestepping the compromise reached by the LIBE committee, the conservative and socialist leaders accepted a text that did not contain any of the core concerns of the EP – concerns that were embedded in data protection issues and thus reflected the traditional policy preferences of the EP. The only points that could be considered a success for the EP were ‘ancillary points’ (Peers 2005, 1). The EP was indeed effective in including a reference to criminal sanctions (Article 13) and insisted on tying the directive to some data protection elements. For instance, it included an explicit reference to general principles of data protection (Article 7) and tightened the role of supervisory authorities (Article 9) as well as the possibility of finding remedies in cases of data protection breaches (Article 13). However, these data protection elements were already *de facto* covered by Directives 95/46/EC on *Data Protection* and 2002/58/EC on *Electronic Communications* (European Parliament & Council of the European Union 1995, 2002).

The final agreement dismissed other ancillary points proposed by the EP, such as the extension of statistical data to be transmitted to the Commission and the necessity to report the results to the EP (European Parliament 2005, amendment 39). More importantly, the final text did not incorporate the necessity to take human rights into account when evaluating the implementation of the directive (European Parliament 2005a, amendment 43) or the necessity to fully reimburse telecommunications providers for the costs encountered. Finally, the Council and EP managed to convince the Commission of the necessity to have a full legislative evaluation of the directive (i.e. using the co-decision procedure if it needed to be amended) instead of a mere review via comitology. However, the evaluation was maintained at three years instead of the two years proposed by the LIBE committee (European Parliament 2005a, amendment 45) and no sunset clause was inserted in the final text (Article 14). A sunset clause would have restricted the validity of the act to a certain amount of time (e.g. three years), after which it would have had to be fully renegotiated or let to lapse if no longer necessary.

It is therefore clear that the EP was unable to maintain the high data protection standards that it had claimed for years under the consultation procedure. The following section will investigate the reasons for such a change in the preferences of the EP as well as the motivations for accepting a first-reading deal instead of pushing for a second reading or even reaching the conciliation procedure.

5.2. Constructing coalitions or acting ‘responsibly’?

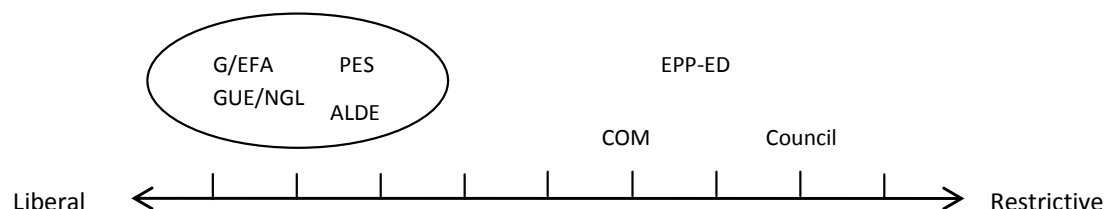
This section takes stock of the previous account of the directive and uses it as a base to compare rationalist and constructivist understandings of the change in the EP’s policy preferences. The comparison attempts to maximise the explanatory capacity of the theoretical models as well as to find common ground and discrepancies between them.

5.2.1. Rationalism: constructing successful coalitions

As seen in Chapter four, a rationalist understanding of policy preference change assumes that change occurs when a group of MEPs is able to bargain successfully and form a winning coalition (as well as a compromise with the Council). As a result, it will be able to change the *status quo* and alter the policy preferences of the EP. It is also assumed that it is in the interest of the EP to strive for three readings (or, at least, use the threat of conciliation) in order to maximise its policy interests. Therefore, the model needs to answer two questions relating to the case study. First, why did the EP accept a first-reading compromise; second, why was the coalition reflecting the *status quo* in LIBE not maintained at plenary level?

In order to answer these questions, it is necessary, first of all, to look at the policy preferences of the EP in the area of data protection before the change to co-decision. Doing that helps us to understand where the status quo was traditionally situated.

Figure 5.2.: Distributional Line – Traditional Preferences on Data Protection



Source: Author’s own estimations

Abbreviations:

EPP-ED: European People’s Party-European Democrats (Christian-democrats/conservative)

COM: European Commission

ALDE: Alliance of Liberals and Democrats for Europe (liberals)

PES: Party of European Socialists (socialists)

G/EFA: Greens-European Free Alliance (green/regionalist)

GUE/NGL: European United Left-Nordic Green Left (radical left)

An examination of data protection legislation shows that the LIBE committee had been, as a whole, a long-standing advocate for high data protection standards (De Hert et al. 2008). Figure 5.2. summarises the existing literature as well as information gathered in interviews, media reports and official documents in order to illustrate the positions of the key actors on the security-liberty substantive dimension. These distributional lines are used as a device to guide readers and make it easier to visualise the different positions; they do not seek to measure the levels of restriction or liberty of their respective positions. The EP groups enclosed in a circle represent the traditional left-wing coalition that existed in the LIBE committee.

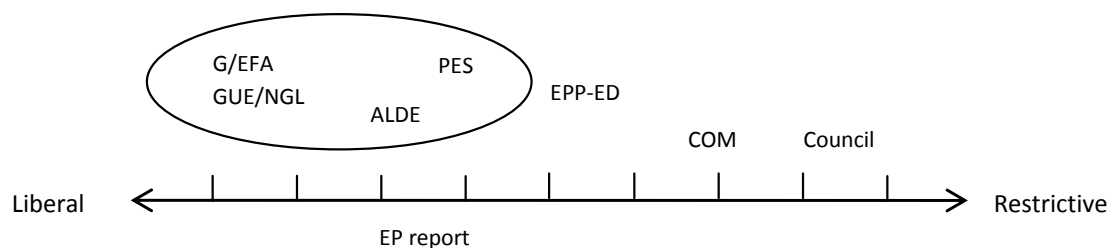
This coalition was at the core of LIBE and took the lead in very prominent cases such as the *EU-US Agreement on PNR* (Brouwer 2009) or the third-pillar *Framework Decision on Data Protection* (O'Neill 2010). In both cases, the LIBE committee fought a long battle to convince the Council of the necessity to tighten the protection of personal data. In the case of PNR, the insistence of the Council to exclude the EP from the negotiations and ignore its opinion brought the EP to make appeal to the ECJ. With this action, the EP sought to annul the content of the agreement. Albeit unsuccessful, the ECJ case was a clear example of LIBE's fight for higher data protection standards (Guild & Brouwer 2006; Hailbronner et al. 2008). It is also clear that the fight was led by a left-wing coalition; for instance, in 2007, the EP voted on a motion for resolution on a PNR Agreement with the US. The resolution was drafted by the PES, ALDE, Greens/EFA and the radical left GUE/NGL (European Parliament 2007a).

As for the *Data Protection Framework Decision* for the third pillar, LIBE was the driving force since its inception. Council and Commission had always been reticent and it was only due to the insistence of the EP that the instrument saw the light. However, the EP rejected several proposals made by the Council because they did not go far enough in the protection of personal data. It also claimed that the Council had changed the proposal to such an extent that it was essentially a different text to that submitted to the EP for its

opinion. The EP tried to change the last version by introducing higher standards of data protection and linking the proposal to existing data protection instruments. Although the Council dismissed most of these modifications, the efforts of the EP to raise the levels of protection demonstrate its willingness to obtain an instrument that went beyond the lowest common denominator (De Hert & Papakonstantinou 2009; EDRI 2009b).

In comparison, the position of the Commission and the Council regularly tilted towards the restrictive side, although in different degrees. Historically, neither of them had had a special interest in harmonising data protection standards (De Hert et al. 2008, 127; Newman 2008, 109). The Commission remained inactive for most of the 1970s and 1980s, until pressures from the Single Market and Schengen forced it to legislate (De Hert et al. 2008; Newman 2008; Pearce & Platten 1998). Its interest remained limited to the first pillar: while the *Data Protection Directive* was agreed in 1995, it was not until 2005 that the Commission drafted a similar instrument for the third pillar. On the other hand, the Council persistently tried to find flexible solutions to satisfy the needs of law enforcement authorities. At the same time, it also showed reluctance to introduce new data protection measures in the third pillar (De Hert et al. 2008).

**Figure 5.3.: Distributional Line – Preferences on the ‘Data Retention’ Directive
(LIBE Committee)**



Source: Author's own estimations

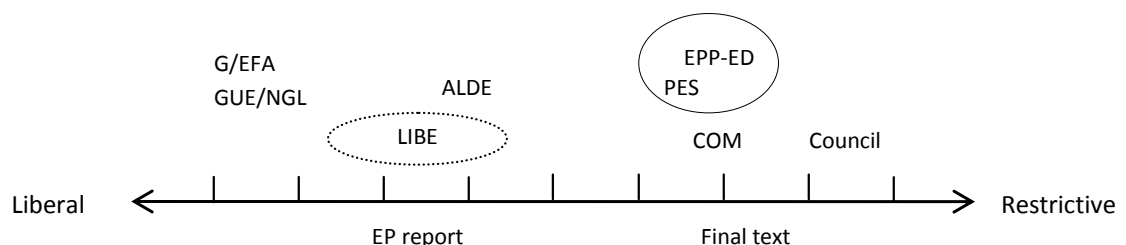
The *status quo* depicted in Figure 5.2. remained the same during discussions on the 'Data retention' directive. Figure 5.3. shows how the Commission positioned itself very closely to the preferences of the Council. In effect, its proposal integrated – with very few changes – the Council's state of play on the Framework Decision. Certainly, the Commission text tried to create a more coherent framework by introducing more references to existing data protection directives and copying the structure of these

directives. At the same time, the proposal went even further than what member states had proposed by reintroducing the idea of ‘prevention’ of serious crime, i.e. giving member states the right to retain data for pre-emptive purposes.

Since the Council was negotiating a first- and third-pillar instrument in parallel and had been discussing the text for a long time, it was relatively easy to maintain the *status quo* and force the Commission and the EP to make moves towards its position. However, this strategy was not entirely effective, since during discussions both on the third-pillar Framework Decision and on the Commission’s proposal, the LIBE committee confronted the position of the Council in a cohesive way. The position of the LIBE committee reflected the unanimous preference for higher data protection standards (European Parliament 2005c). The oral and written questions addressed to the Council and the Commission since 2002 revealed the reservations raised by all political groups regarding the necessity and proportionality of a ‘data retention’ instrument (European Parliament 2005b, 2005c, 2005f, 2005d, 2005e).

However, each side of the political spectrum highlighted different issues: the left-wing groups and liberals insisted on the proportionality of the proposal and the need to respect Article 8 ECHR; the centre-right emphasised the necessity and the costs that companies would encounter after the implementation of the proposal. Yet, even if the EPP-ED’s position was the most peripheral – and in some aspects relatively close to the Council’s position – the LIBE committee was united in its opposition to the Council⁴². After all, the report was passed in committee with a large majority (33 votes for, out of 46 votes).

Figure 5.4.: Distributional Line – Preferences on the ‘Data Retention’ Directive (Plenary)



Source: Author’s own estimations

⁴² ALDE political advisor B, interview, March 2011.

In comparison, the position of the EP changed significantly once the directive was voted at plenary level. Figure 5.4. shows the configuration of the plenary vote. The dark circle represents the final grand coalition that passed the text. This coalition was distinctively different from the one formed at committee level (represented as a single LIBE position – enclosed inside a lighter circle). The positions of the other EP groups represent their final position at the plenary stage.

It is clear that the smaller groups maintained the same positions that they had held in committee (although the liberals were more divided in the final vote than they had been in LIBE), while the larger groups decided to do a U-turn. They ignored the compromise struck by the rapporteur (and largely supported by all groups in LIBE) and accepted a new text that reflected the Council's position with almost no changes. It was, indeed, a 'take-it-or-leave-it' offer from the presidency⁴³. Despite the efforts of the Greens and the radical left to split the votes in order to change some parts of the compromise, the socialists and conservatives proved resilient and refused any attempts to introduce new amendments to the text⁴⁴. As a result, the position of the winning coalition was, in the end, very close to the position of the Council and the Commission.

The final grand coalition forged by the two largest groups in the EP reveal how easy it proved for the Council to keep the *status quo*, especially when it started to negotiate directly with the EP political leaders. During these high-level negotiations, the presidency used the shadow of a third-pillar text very effectively: as soon as the proposed directive diverged too much from its preferred position, the presidency threatened to abandon the first-pillar text in favour of a framework decision. This threat worked much better with EP leaders – more detached from the details of negotiations – than with the LIBE committee. The latter would have easily realised that the presidency was bluffing, first because some key members of the Council did not support the third-pillar instrument – for which unanimity was required (EDRI 2005) – and, second, because it was not in the interest of the presidency to revert back to a third-pillar text, which would have been seen as a failure⁴⁵.

However, the British presidency was able to use the third-pillar instrument as a stick, while using one of the EP's long-standing demands (an agreement on a data

⁴³ Ibid.

⁴⁴ Sidenius, interview, March 2011.

⁴⁵ S&D political advisor, interview, March 2011.

protection instrument for third-pillar issues) as a carrot⁴⁶ (De Hert et al. 2008, 163). Therefore, the decision of the political leaders can be understood as a short-term measure to secure a first-pillar deal – seen as more optimal than ending up with a third-pillar instrument –, while trying to secure a medium-term goal by using issue-linkage during the bargaining process. Forfeiting some preferences in the short-term (i.e. on data retention) guaranteed some progress in another instrument (data protection framework for the third pillar), seen as equally important but more difficult to obtain.

The pressures from the Council (and from several national parties in government⁴⁷) and the prospect of obtaining a long wished-for instrument in the near future explain why the LIBE committee's report was by-passed by the two largest groups. However, it does not fully explain why their leaders accepted a quick first-reading agreement instead of pushing for a second reading. Even in 2002 – when the same political groups decided to by-pass the LIBE committee – they did so in second reading. At that point, it could be argued that they tried to prevent a conciliation procedure. By contrast, in 2005 the political leaders did not even give an opportunity to the LIBE committee to extract more concessions from the Council in a second reading. The largest groups were worried that the next presidencies (Austria and Germany) would be reluctant to continue negotiations in second reading⁴⁸.

However, if the substance of the proposal was as important to the EP as it had been claimed during the previous period (when consultation prevailed), why not attempt to fight for their preferences in a second or third (conciliation) reading? In fact, ALDE had decided to go for a second reading, despite the gamble it supposed in view of the next presidencies⁴⁹. Even if the Council decided to opt for a third-pillar instrument, the EP could have tried to challenge this decision in the ECJ. The rapporteur envisaged this possibility and expected to receive support from all political groups – the EPP-ED included (Euractiv 2005b). During that same period, the ECJ had decided to annul a third-pillar text on environmental criminal sanctions because it considered that the objective of the instrument was to achieve environmental protection (a first-pillar issue), rather than cooperation in criminal law (European Court of Justice 2005b).

⁴⁶ Alvaro, interview, January 2009.

⁴⁷ ALDE political advisor B, interview, March 2011.

⁴⁸ Ibid.

⁴⁹ Ibid.

Therefore, the rationalist model emphasises formal motivations for the change in the policy preferences of the EP. Socialist and conservative leaders used bargaining to ensure a first-reading deal and the future possibility to obtain higher data protection standards in the third pillar. It seems that the 'sensitivity to failure' and the specific time horizons created by the change to co-decision (especially in relation to third-pillar matters) were more relevant to the main EP leaders than making use of their veto powers (i.e. conciliation) or exploiting the 'justiciability' of an eventual third-pillar text. In this sense, rationalist understandings of co-decision place the mechanisms of change in an iterative nested game, in which EP political leaders had to ensure their effective participation to be successful in future negotiations. However, the radical U-turn in the preferences of the EP is still perplexing. Because data protection was such an important issue for the EP, it is difficult to understand why socialist and conservative political leaders did not give a chance to the LIBE committee to continue negotiations. A second reading (or even conciliation) might have allowed it to maximise its preferences to a further extent than a fast-tracked first-reading deal.

5.2.2. Constructivism: legitimising the new patterns of behaviour

In contrast to rationalism, the constructivist model looks at how policy preferences resonate with the norms of the existing institutional framework. In order to unveil the different discourses competing for legitimacy, it is essential to analyse the use of concepts and words. In consequence, this section will examine how actors presented and legitimised their actions based on interviews, public debates and interventions in the media.

As seen in Chapter four, EU institutions have developed various procedural and substantive 'meta-norms' that serve to legitimise the choice of policy preferences. In the AFSJ, these 'meta-norms' call for the protection of EU citizens from any potential threats as well as for further integration in internal security matters. These specific 'meta-norms' underlined the willingness of the EP to expand its influence in this policy area. However, as seen above, issues related to data protection had been characterised for their confrontational nature, which had relegated the EP to the sidelines of decision-making. With the extension of co-decision, MEPs were requested to behave 'responsibly' in inter-institutional negotiations. This idea of 'responsibility' was more procedural than substantive; MEPs had to adapt to new patterns of behaviour requiring more consensual

positions, even if this contradicted the responsibility of MEPs towards the citizens they are supposed to represent.

Although the 'Data retention' directive was not directly affected by the end of the transitional period in 2005, the change in the legal basis turned it, in practice, into one of the first texts on internal security matters to be decided by the LIBE committee under co-decision. As a result, it was affected by the general feeling that – after the end of the transitional period – the EP had to start behaving 'responsibly' in order to be taken seriously by the Council (Angenendt & Parkes 2009; Parkes 2009)⁵⁰. In practice, this meant that at the beginning of this new 'co-decision era', group leaders tried to persuade their members that being able to achieve quick compromises was a sign of institutional maturity⁵¹.

This was even more relevant in the case of data retention, since the EP had been considerably confrontational when negotiating the third-pillar text⁵². Members of LIBE had repeatedly questioned the necessity and proportionality of data retention, with the effect that, in June 2005, the opinion provided by the committee under consultation had recommended the rejection of the Council's text (European Parliament 2005h). However, data retention was not an isolated case. Generally, inter-institutional relations had been conflictive under consultation and neither side was used to working together⁵³.

Consequently, during the rapid negotiations on a 'Data retention' directive of autumn 2005, the LIBE committee maintained the same behaviour that it had exhibited before the change to co-decision. At the same time, the Council acted as if it were under consultation as well. It set the agenda and expected the EP to follow. As the negotiations went by, it became apparent to socialist and conservative leaders that, if they wanted to have some influence, they needed to learn a new behaviour. Their amendments would now be legally binding and this required more 'responsibility'⁵⁴. In consequence, in this new environment, the substantive issues (i.e. data protection) mattered less than the potential to increase the influence of the EP, not just in the short-term but also in future. The main

⁵⁰ S&D political advisor, interview, March 2011.

⁵¹ Alvaro; Commission official B, interviews, January 2009, S&D political advisor, interview, March 2011.

⁵² Commission official B, interview, January 2009.

⁵³ Hennis-Plasschaert; MEP assistant B; Commission official D, interviews, March 2010.

⁵⁴ EP official B, interview, January 2010.

achievement of the 'Data retention' directive was thus to gain co-decision in a very sensitive area, even if it meant that the EP could not take the same liberal views that it had held under consultation⁵⁵.

The liberal positions of the LIBE committee had never been a problem previously given that they did not have an impact on the actual decision-making process. Since EP opinions were often disregarded (Kostakopoulou 2000, 498; Peers 2006, 26), the promotion of liberal positions did not contradict the institutional attempt to obtain more powers. Fighting for more data protection went hand in hand with attempting to extend co-decision to the whole AFSJ. In addition, the liberal views held by the EP on internal security matters gave it a good reputation and a positive image towards the outside world (Acosta 2009b). Once under co-decision, the liberal views of the LIBE committee became too far apart from the Council's and made it difficult to find points of agreement. As seen in Chapter four, the introduction of co-decision had created new inter-institutional norms of behaviour that required more moderate positions from all sides. The formal structure of the procedure (with both the EP and the Council as veto points) enhanced the need to find consensus and thus pushed the legislative outcomes towards the centre of the policy spectrum, i.e. towards less radical policy alternatives.

These new patterns of behaviour could not be accommodated with the confrontational policy positions characteristic of the LIBE committee. In this new context, two diverging discourses appeared in the EP, one from the LIBE committee – where members tried to find a balance between the new norms of behaviour and a coherent substantive position that would reflect the traditional LIBE preferences on data protection⁵⁶; the other coming from the Council and the presidency – who used the change to co-decision to shape the meaning of 'responsibility' and 'maturity'.

The LIBE committee's discourse resonated with that used under consultation. It started by using a confrontational tone, since it expected that the Council would ignore its policy positions – as it had usually done under consultation. In consequence, the committee decided to discuss the proposal firstly among them in order to find a "common and strong position in Parliament to be able to have a strong position in the co-decision procedure"⁵⁷.

⁵⁵ S&D political advisor, interview, March 2011.

⁵⁶ Ibid.

⁵⁷ Alvaro, interview, January 2009.

This strategy reflects the assumption that co-decision should not be all about compromise but about acting as an opposition to Council. Moreover, the discourse of the committee was more sensitive to data protection arguments and thus more open to following the formal rules of co-decision. The rapporteur wanted to achieve a strong position in LIBE so that it would be more difficult for the Council to reject the preferences of the EP⁵⁸.

However, once negotiations started, the discourse was nuanced and some key players in LIBE acknowledged the need to find points of agreement with the other institutions. For instance, in early November 2005, Alvaro declared:

“We cannot let the opportunity pass to create a precedence [*sic.*], which would guarantee that the European Parliament will in future participate in the most important domestic policy decisions. Yet we must remain clear about the fact that the final compromise mustn’t result in political horse-trading. (...) Council should at the same time handle important issues of policy in justice and home affairs by co-decision, where Parliament merely has consultation rights so far. This would constitute a democratic quantum leap in the European Union” (Alvaro in Euractiv 2005a).

On the one hand, his position reflects the old discourse used under consultation; it emphasises the need to enlarge co-decision to all the issues in the AFSJ and insists on the need to prioritise policy issues. On the other hand, it acknowledges that a change of behaviour is needed to ensure that the EP will be included in future co-decision negotiations. Therefore, it is clear that, although LIBE resisted the arguments in favour of a quick compromise, the need to be more consensual was not lost to its members. Alvaro accepted that MEPs were now more aware of the fact that they would have to “do responsible legislation”⁵⁹.

In contrast, a more widespread discourse was used to put pressure on the EP – especially on the two largest groups, seen as the key pieces to form stable grand coalitions. Socialists and conservatives had traditionally voted together when a file was perceived as inter-institutionally loaded (Kreppel & Hix 2003). The ‘Data retention’ directive was one of those occasions, since it was a key text for the EP in the area of data protection and, more generally, in internal security matters. The presidency assured political groups’ leaders that, if they were consensual and showed a mature behaviour in this case, it would attempt

⁵⁸ Ibid.

⁵⁹ Ibid.

to convince the other members of the Council to make use of the *passerelle* clause⁶⁰ in order to extend co-decision to some of the JHA issues still in the third pillar⁶¹. The use of the *passerelle* clause had been a constant request of the EP and the Commission, especially in the aftermath of the Constitutional Treaty, where the pillar structure had already been abolished⁶².

As mentioned above, the successful use of the *passerelle* clause as a negotiating asset is slightly puzzling. It seems that there was an element of personal trust towards Charles Clarke that made it convincing⁶³. However those involved in negotiations – and thus more aware of the position of member states in the Council – knew that the use of this clause was dubious⁶⁴. For instance, it was more than probable that some key member states like Germany would oppose the use of the *passerelle* clause in the Council (Monar 2007, 120-122). In consequence, Alvaro considered that the Council used a “very simple trick” and that group leaders fell for it⁶⁵.

However, it is not impossible to imagine why this proposition sounded attractive to EP leaders. On the one hand, EP leaders considered that the use of the *passerelle* clause would give the EP more influence in the AFSJ, especially in upcoming decisions (such as the above-mentioned *Data Protection Framework Decision for third-pillar matters*), which might indirectly affect some of the issues discussed in data retention. In consequence, the sacrifice made in terms of policy preferences was seen as minor compared to the potential increase in the EP’s inter-institutional influence. In this sense, it resonated with the procedural ‘meta-norms’ aiming to increase the capacity of the EU to further integration in the AFSJ.

On the other hand, it gave them a window of opportunity to reduce the gap between the EP’s and the Council’s policy preferences. The necessity to find a new common ground was accentuated by the extraordinary pressure exercised by Clarke⁶⁶.

⁶⁰ Article 42 TEU offered the possibility to member states to transfer parts (or the entirety) of the third pillar to the first pillar. This decision needed to be reached by unanimity and could be subjected to any formal processes of adoption at national level (i.e. possible national ratifications).

⁶¹ Alvaro, interview, January 2009; ALDE political advisor B, interview, March 2011.

⁶² Commission official A, interview, January 2009; S&D political advisor, interview, March 2011.

⁶³ ALDE political advisor B, interview, March 2011.

⁶⁴ S&D political advisor, interview, March 2011.

⁶⁵ Alvaro, interview, January 2009.

⁶⁶ Ibid.; Commission officials A and B, interviews, January 2009.

Clarke was very much involved in negotiations. He addressed both the LIBE committee and the plenary on several occasions between July and October 2005 (European Parliament 2005k, 2005b, 2005h); during negotiations, he was in touch with the EP on a daily basis⁶⁷. He lobbied the larger groups and explained to MEPs why it was politically urgent to have a 'data retention' instrument⁶⁸. Therefore, when he declared that "if parliament failed, he would make sure the European Parliament would no longer have a say anymore on any JHA matters" (EDRI 2005), EP leaders believed the threat.

As a result, EP political leaders by-passed the committee due to a timely combination: on the one hand, they realised that the LIBE committee could not maintain its policy preferences if they were to ensure the presence of the EP in the AFSJ in the long-term; on the other hand, the Council and the presidency developed a discourse that fitted better with their normative expectations. Their use of concepts such as 'compromise' and 'maturity' resonated better with both the substantive and procedural 'meta-norms'.

On the procedural side, the pressure exercised by the Council and, especially, Charles Clarke was effective because it put the EP into a 'normative' impasse. This pressure had started from the moment that the presidency had decided to start negotiations on a first-pillar text. One of the conditions requested in order to change to co-decision had been that political leaders should commit themselves to negotiate openly and avoid going into negotiations with old prejudices⁶⁹. In view of these conditions and of the pressure exerted by the presidency, EP leaders decided to play it safe and find a quick agreement⁷⁰. They were afraid that failing to find an agreement that would make the Council happy (especially the presidency) would translate into a long-term conflict with member states, which could block the capacity of the EP to participate effectively in the development of the AFSJ.

On the substantive side, Clarke appealed to the interest of the EP in portraying itself as an essential actor in the fight against terrorism (Clarke in European Parliament 2005a). In the aftermath of the attacks in Madrid and London, such arguments were very compelling in order to mobilise the largest groups, since their leaders wanted to come across as pro-active defenders of citizens' security. In fact, the groups' leaders involved in

⁶⁷ EP official B, interview, March 2010.

⁶⁸ EPP staff, interview, March 2011.

⁶⁹ S&D political advisor, interview, March 2011.

⁷⁰ Commission official A, interview, January 2009.

negotiations used these arguments to motivate their vote in favour of the inter-institutional agreement. For instance, the EPP-ED insisted that it was necessary to be effective and find solutions that benefited citizens⁷¹. Reul (EPP-ED) summed it up succinctly by saying that “[r]ather than this being allowed to become a never-ending story, what we wanted was a prompt result. People are entitled to have results put in front of them without delay” (Reul in European Parliament 2005a). In this sense, they distanced the group from the traditional confrontational LIBE behaviour, usually considered as ineffectual⁷², and blamed ALDE for not being pliant enough during negotiations⁷³.

During the plenary debates, most spokespersons also emphasised the momentum created by the change to co-decision, which gave a special importance to the decision, since it portrayed the capacity of the EP to legislate effectively in areas formerly under the third pillar (Klamt, Kreissl-Dörfler and Cavada in European Parliament 2005a). For instance, Kreissl-Dörfler declared, on behalf of the socialist group, that

“[n]ow, for the first time, the European Parliament is involved in the third pillar, that of internal security, to which codecision applies, something that was not wanted by all the Member States (...).Deciding where the European level can and may influence the national level and where it cannot and may not, without, in so doing, needlessly curtailing the rights of the national parliaments and/or voiding their powers, will be a veritable tightrope walk” (Kreissl-Dörfler in European Parliament 2005a).

His comments reflect the perceived sensitivity of the directive and the sudden responsibility given to the EP.

The chair of the LIBE committee (ALDE MEP Jean- Marie Cavada) – who also helped to circumvent the rapporteur⁷⁴ – summed up these arguments by stating that the agreement would

“mainly propose something new in an area that affects public opinion, which is itself capable of recognising that we work in harmony to safeguard its interests, far removed from any power struggles and legal specificities. (...) [W]e are ready to rise to this intelligent challenge wisely overseen by the three parties, and I hope that this excellent cooperation between the Council, the Commission and Parliament will continue” (Cavada in European Parliament 2005a).

⁷¹ ALDE political advisor B, interview, March 2011.

⁷² Speiser, interview, January 2009; Weber, interview, November 2009.

⁷³ Sidenius, interview, March 2011.

⁷⁴ EP official B, interview, March 2010.

Therefore, the necessity to legitimise the choices of the EP by appealing to broader ‘meta-noms’ offered a chance to the Council, the presidency and the main EP political leaders to engage in a strategy of discursive entrepreneurship. By using discourses that resonated with the wider institutional preferences, these different discursive entrepreneurs legitimated the policy change. After so many years waiting to expand their powers in the AFSJ, group leaders did not want to jeopardise future negotiations. They reassured the Council that their claims of being a legitimate actor in the AFSJ were correct and that member states could trust Parliament to behave ‘responsibly’ in the future. In turn, the EP learnt that “it could not get a fabulous position anymore, only the best possible outcome”⁷⁵.

Conclusion

What does the ‘Data retention’ directive tell us about change in the policy preferences of the EP? First of all, that – contrary to the period when consultation was the main decision-making procedure – the EP cannot be taken for granted any longer as an unconditional advocate of data protection and civil liberties in general. Certainly, outcomes were less restrictive than if they had depended only on a Council decision; however they did not fit either into the liberal image portrayed by the EP under consultation. How do we explain such a shift in the preferences of the EP? Was it merely a strategy to achieve the necessary winning coalition or did it go beyond a pure calculation of cost and benefits?

This chapter has applied two theoretical models of co-decision on the ‘Data retention’ directive. The exercise has allowed us to uncover different explanations for the change in EP policy preferences. These different accounts maximise our understanding of what happened during negotiations and allow us to examine the different mechanisms of change at work. The two models raise divergences in the layers of action but coincide in the ‘directionality’ of change.

The rational-choice model has shown why the socialist and conservative leaders of the EP political groups might have preferred to reach an agreement on the directive instead of pushing negotiations until conciliation. The fear of ending up with a third-pillar text was, for them, powerful enough to make them accept a sub-optimal outcome and ignore

⁷⁵ S&D political advisor, interview, March 2011.

the warnings coming from the LIBE committee that the threat might be a bluff. The model also looks at co-decision as an iterative nested game. In this sense, the presidency used issue-linkage, to convince EP political leaders that more moderate results on this occasion would be compensated in future negotiations. The Council knew that broader and longer-term policy changes – such as a data protection framework for third-pillar issues and even the use of the *passerelle* clause – were more rewarding for EP leaders. In a sense, their interests had more potential to be maximised in these two longer-term issues than under the ‘Data retention’ directive. They would affect wider issues and would provide more publicity, especially given that they were recurrent demands from the EP.

However, rationalist explanations focus on the bargaining process and on the capacity of EP political groups to find winning coalitions. They focus on agent-based explanations acting in a formal layer composed of decision-making rules, such as voting thresholds or time limits. In this sense, the rationalist model explains the workings of co-decision but also raises new questions. In particular, it leads us to ask why EP political leaders did not give more time to LIBE to push the EP’s policy preferences further in the game. After all, the large majority in the LIBE committee supporting a more data protection-oriented solution as well as the recent ECJ case-law on cross-pillar competences were encouraging enough to push for a second reading or a conciliation procedure.

One possible explanation is that the importance accorded to longer-term benefits and to keeping the text in the first-pillar offered an advantage to the Council. The specific time horizons of the EP and its ‘sensitivity to failure’ strengthened the bargaining power of the Council. In comparison, the EP failed to capitalise on its potential advantages, namely the veto power contained in a potential conciliation procedure or the high ‘justiciability’ of an eventual third-pillar text. Such bargaining strengths could have been easily mobilised by the EP if it had wished to do so.

The constructivist model offers an alternative explanation on policy preferences change that helps to fill the gaps left by the rationalist model. A constructivist understanding of co-decision can explain how policy change happened but also why it was so readily accepted by a large proportion of MEPs. Constructivism underlines the necessity to examine the informal layer of policy change. This layer defines a broader institutional context, constituted by ‘meta-norms’, that is, specific understandings and norms of behaviour. On this occasion, the traditional policy preferences of the EP did not resonate

anymore with the new normative framework that the extension of co-decision introduced in the AFSJ. The liberal position of the EP on data protection issues – often accompanied by a confrontational behaviour – started to create conflicts with the norm of consensus promoted by co-decision, which ensured, in turn, an effective participation of the EP in internal security matters.

Timing is also crucial to understand the lack of resonance between the EP's traditional policy preferences and the new patterns of behaviour emphasising consensus and efficiency. Given that the directive was one of the first co-decision procedures after the end of the transitional period in 2005, actors believed that the EP had to be more 'responsible' in order to gain more influence in the AFSJ. Therefore, the constructivist explanation resonates with the rationalist view of iterative games: the need to negotiate time and again with the Council required a more 'responsible' behaviour that would result in a more constructive dialogue. Consequently, 'responsibility' required a more 'pragmatic' behaviour, i.e. the EP needed to be more flexible in its policy positions in order to find a successful compromise with the Council. Therefore, the liberal paradigm – with its confrontational behaviour and unyielding demands for higher data protection standards – started to be seen as an obstacle rather than as an asset for the EP.

The behaviour of the two largest groups can be understood as an attempt to radically change the image of the EP in the AFSJ. To obtain quick results, the socialist and conservative leaders opted for a strategy of discursive entrepreneurship, whereby – by appealing to procedural and substantive 'meta-norms' – they forced a change in the policy preferences of the EP, perceived as too rigid and alienating for the Council. Their actions checked any attempt of the LIBE committee to put their policy preferences in front of the institutional preferences of the EP. The promotion of a discourse that fitted into these wider institutional norms is essential to understand why their decision to by-pass the position of the LIBE committee was accepted and seen as legitimate by most internal and external actors. The socialist and conservative leaders chose the perfect timing to enter into discursive entrepreneurship, since the change of procedure and the new patterns of behaviour introduced by co-decision justified the formation of a grand coalition – normally used on those occasions when unity is seen as crucial for the EP. In a more stable situation, the decision to by-pass the LIBE committee might have received more criticism than it did on this occasion.

As a result, one can see that the use of models maximises the number of explanations and fills the gap left by the other model, yet, at the same time, helps to make explanations parsimonious. The two models also highlight different layers of, and motivations for, change, identifying thus frictions and synergies between them. First, the analysis identifies two different layers of institutional change: a formal layer derived from the textual application of decision-making rules and an informal layer appealing to broader norms of behaviour. Second, the models point out synergies between the layers; formal and informal explanations reinforce the 'directionality' of change, which renders the U-turn in the EP's policy preferences easier to perform and more legitimate.

In terms of 'directionality', the behaviour of the socialist and conservative leaders exemplifies how rationalist and constructivist explanations can reinforce each other by looking into both formal and informal motivations for change. The fact that both layers point in the same direction (i.e. towards change in the policy preferences) helps to understand why a U-turn in the priorities of the EP was possible and quickly achieved. It also explains why such a move was hardly contested at the plenary level. In this sense, the political leaders' decision to by-pass the agreement proposed by the LIBE committee can be explained as a rational calculation in an iterative nested game. Co-decision being the new rule of decision-making in the AFSJ, an early exclusion from bargaining could have had short and long-term consequences. On the one hand, it might have meant that the directive was passed in the Council as a third-pillar instrument. On the other hand, the EP leaders were concerned that alienating themselves at this stage would have long-term consequences for an effective involvement in the AFSJ – a danger that Clarke's threats seemed to confirm. At the same time, the change can only be understood if one looks at the informal side of the institution. In this sense, the rapid U-turn could only be accepted and consolidated because it resonated with the institutional norms of behaviour required by co-decision.

In conclusion, the fact that rationalist and constructivist explanations move in the same direction highlights synergies that have wider consequences. Both explanations point to the primacy of institutional elements (both formal and informal) and underline a friction between institutional and policy preferences that may have a significant effect on policy outcomes. The 'Data protection' directive clearly shows that the willingness to ensure a leading role for the EP in the AFSJ came at the expense of its traditional liberal position on

data protection issues. Although the EP was more effective in raising the standard of data protection than member states, the final result came short of expectations – with all the implications this may have for EU citizens.

In fact, the directive has proved to be a contested tool both at EU and national level⁷⁶. The Commission is currently undertaking an evaluation of the directive, which should lead to the revision and recast of the existing text⁷⁷. This will offer a new opportunity in which the EP has a chance to decide between modifying and improving certain parts of the directive or overhauling the very principle of data retention⁷⁸. The latter option would mean a return to its previous policy preferences, where data protection safeguards and a proportional use of security tools prevailed. However, if it does not contest the necessity for retaining data protection, the EP will consolidate the path taken in 2005 towards a more security-friendly position in internal security matters.

⁷⁶ Several member states have examined the compatibility of the directive with national constitutions (Germany, Czech Republic and Romania) and Ireland contested the use of Article 95 TEC as legal basis. Implementation has also proved problematic, either technically (S&D political advisor, interview, March 2011; Commission official H, interview, April 2011) or politically. For instance, Sweden has refused to implement the directive, despite facing penalties by the Commission (Commission official B, interview, April 2011).

⁷⁷ Commission official H, interview, April 2011.

⁷⁸ Commission officials B and H, interviews, April 2011.

Chapter 6: The 'Returns' Directive

Introduction

Three years after the 'Data retention' directive, another agreement – the 'Returns' directive (European Parliament & Council of the European Union 2008) – raised disapproval inside and outside the EU (Acosta 2009a)⁷⁹. In this case, the directive sought to harmonise the conditions determining the voluntary or compulsory return of third-country nationals (TCNs) staying irregularly on the territory of member states. In other words, it aimed to achieve some minimum standards on how to send back those migrants staying on the territory without the necessary documents. This group included 'over-stayers' and immigrants that had crossed the border irregularly; it also covered those asylum-seekers whose applications had been rejected.

Before the adoption of the directive, member states had very different return policies and practices (Hailbronner 2005, XXIII). As a consequence, the proposal tried to close the gap between the highest and lowest standards of protection in member states' legislation (House of Lords, European Union Committee 2006). The objective was to create a common approach and improve cooperation; the latter being the most important added value for member states. Given their resistance towards harmonisation, the main stake of the 'Returns' directive was whether enough member states would be willing to depart from the *status quo* (House of Lords, European Union Committee 2006). From the very early stages, the main argument between the EP and the Council focused on whether a directive was necessary – with the EP insistent that it was and member states generally showing reluctance.

⁷⁹ Please note that elements of Chapter six have been published in A. Ripoll Servent, 2009. Setting Priorities: Functional and Substantive Dimensions of Irregular Immigration and Data Protection Under Co-decision. *Journal of Contemporary European Research*, 5(2), pp.225-242; A. Ripoll Servent, 2010. The European Parliament and the "Returns" Directive: The End of Radical Contestation; the Start of Consensual Constraints. *SEI Working Papers*, 117. Available from: www.sussex.ac.uk/sei/documents/sei-working-paper-no-117.pdf [Accessed 4 August 2010]; and A. Ripoll Servent, 2011. Co-decision in the European Parliament: Comparing Rationalist and Constructivist Explanations of the Returns Directive. *Journal of Contemporary European Research*, 7(1), pp. 3-22.

Eventually, the final text was seen by many human rights advocates and third countries as a restrictive alternative to national legislation (Amnesty International 2008; ECRE 2008). Similarly to the 'Data retention' directive, the outcome was surprising because it was the first text on irregular immigration that had been negotiated under co-decision; as with data protection, it had been expected that, in this new inter-institutional context, the EP would have a better chance to push for a more liberal policy alternative. However, the 'Returns' directive confounded such expectations; the EP voted for an agreement that was restrictive in its understanding of immigration and left member states with much wide room for manoeuvre (Acosta 2009b; Baldaccini 2009). Although immigration matters had had a lower profile and included more diverse views than data protection (Lahav & Messina 2005), the result was still perceived as a major change in the traditional policy preferences of the LIBE committee.

In view of this change, the present chapter examines the impact that the move to co-decision had on the formulation of such preferences. The 'Returns' directive offers a good starting point to analyse the impact produced by the change of procedure, given that negotiations started in 2005, that is in the aftermath of the change in the decision-making rules. In this sense, it can be effectively compared with the 'Data retention' directive, since negotiations started at a similar time but the 'Returns' directive lasted longer. Therefore, one can examine whether the changes introduced by the 'Data retention' directive had lasting effects on subsequent decisions. However, it is important to note that, given the noticeably longer negotiations, the 'Returns' directive was seen as a more 'normal' co-decision dossier than the 'Data retention' directive⁸⁰.

In order to examine the effects of co-decision on the field of immigration policy, this chapter follows the same logic as the previous one. The first section describes the negotiation process, while the second section applies the two models of co-decision to the 'Returns' directive in order to explain how and why a change in the EP's policy preferences occurred.

⁸⁰ EPP staff. interview, March 2011.

6.1. Between success and failure: Negotiations on the 'Returns' directive

The 'Returns' directive is one of the essential instruments in the construction of an EU immigration policy. Based on Article 63.3.b TEC (now Article 79.2.c. of the Treaty on the Functioning of the European Union [TFEU]) on irregular immigration, the directive is framed as an instrument to deal with the consequences brought by migration policies trying to reduce the number of irregular migrants. Its main objective is the harmonisation of conditions determining the voluntary or compulsory return of TCNs staying irregularly on the territory of member states; this includes the return of rejected asylum-seekers. In this sense, a common returns policy is a very sensitive issue for member states, since it affects their capacity to decide who enters and leaves the territory.

The sensitivity of the subject largely explains the slow progress of negotiations⁸¹. Its origins can be traced back to the Tampere Programme in 1999 (European Council 1999, 26), yet its objectives were not fully defined until 2002 (European Commission 2002b; Council of the European Union 2002b). At that point, irregular immigration was still subjected to the transitional period set by the Treaty of Amsterdam and thus required unanimity in the Council. As a result, despite several attempts to put the matter on the Council table, the requirement to find unanimity made negotiations very difficult. For instance, in 2002, the Commission presented a *Communication on a Community Return Policy on Illegal Residents* (European Commission 2002a), which built on a *Green Paper on a Community Return Policy on Illegal Residents* (European Commission 2002b). The communication was incorporated into a *Council Proposal for a Return Action Programme* (Council of the European Union 2002b), which watered down the Commission's proposal and put more emphasis on soft forms of operational cooperation among member states (Webber 2007, 3).

In view of these difficulties, it was not until 2005 – when irregular immigration could be dealt with QMV in the Council – that the issue was proposed again. In the meantime, the Commission organised an internal consultation among different departments, in order to decide how to proceed with such a sensitive issue⁸². On 1 September 2005, the Commission presented a *Proposal for a Directive on Common Standards*

⁸¹ Ibid.

⁸² Commission official C, interview, April 2011.

and Procedures in Member States for Returning Illegally Staying Third-Country Nationals (European Commission 2005b). Since it came soon after the end of the transitional period, the proposal was among the first to be discussed under co-decision.

The Commission text was more moderate than the previous Council proposals but contained some controversial points. There were six issues that stood out from the proposal. First, there was disagreement regarding the scope of the directive. Article 2 of the Commission text covered those TCNs who were staying irregularly or did not comply with the conditions of entry. However, it did not explicitly cover those individuals in transit zones (the proposal left it to the discretion of member states) and excluded those arrested at the border. Second, the Commission made provision for voluntary departure, which was supposed to simplify the procedure for those that decided to return of their own accord. However, the conditions for voluntary departure specified in Article 6 proved to be a sticking point, since it was not clear what incentives or advantages they provided compared to forced expulsions. Third, Article 9 included the possibility to introduce re-entry bans (forbidding the return of TCNs to Schengen territory for a limited period of time). The proposed length of five years and the conditions for issuing re-entry bans was thoroughly discussed in negotiations. Fourth, in Article 12, the Commission made generous provisions for legal aid when seeking judicial remedy. The extent of the legal aid and the type of remedies (administrative or judicial) were another recurrent issue. Fifth, Chapter IV detailed the conditions for temporary custody. The possibility to detain TCNs during preparations for their removal from the territory and the length of detention were one of the most controversial points in the directive. Finally, the controversy was heightened by Article 15, which specified the conditions determining the detention and expulsion of unaccompanied minors.

The EP appointed Manfred Weber (German, EPP-ED) as rapporteur and designated the LIBE committee as the responsible committee. The EPP-ED organised a roundtable with NGOs in order to gain some expertise from those that had experience on the ground and would be able to raise awareness of major concerns. This decision shaped the position of the EP and created some difficulties when negotiating with the Council at a later stage⁸³. It was especially problematic because the Council had the impression that the Commission

⁸³ Sidenius, interview, March 2011.

text provided too much protection for TCNs and did not welcome such a considerable involvement of NGOs in the process⁸⁴.

Due to the difficulty in reaching an agreement inside the Council, negotiations dragged on and the dossier was eventually discussed under six different presidencies⁸⁵. The length of negotiations and the high number of presidencies affected the pace and nature of the talks between the Council and the EP. The text was not a priority for member states and, therefore, it was not a main concern for most presidencies⁸⁶. The Finnish presidency (second half of 2006) was the first to present a compromise solution, but it was rejected by those member states that wanted more flexibility in the rules (Council of the European Union 2007a). Finland was followed by Germany, which had no interest in a 'Returns' directive and, thus, tried to dilute the agreement by issuing a new (and very loose) proposal.

The German proposal stalled negotiations, both inside the Council (Council of the European Union 2007a) and with the EP. Inside the Council, it gave free reign to those member states unhappy with the directive, especially among those (as mentioned above) who considered that the Commission text offered too many rights and protection to TCNs (Council of the European Union 2006). Another group of member states found fault with the attempts to create common standards, feeling that it would limit their freedom of action at national level. Consequently, in those cases where the Commission wished to harmonise standards, a large majority of member states tried to offset these attempts by introducing more flexibility in the rules (Council of the European Union 2006a, 2006b, 2006e, 2006d, 2006c).

The German proposal also put a break in inter-institutional negotiations⁸⁷. It was not until the Portuguese presidency, in particular⁸⁸, and the Slovenian presidency that some constructive negotiations took place. The LIBE committee voted on 12 September 2007 (European Parliament 2007b), however, this move proved to be slightly problematic because, with the committee level gone, it was more difficult to have a sense of the

⁸⁴ Ibid.; Commission official C, interview, April 2011.

⁸⁵ United Kingdom during the second half of 2005, Austria and Finland in 2006, Germany and Portugal during 2007 and Slovenia in the first half of 2008.

⁸⁶ Council official A, interview, January 2009; Weber, interview, December 2009.

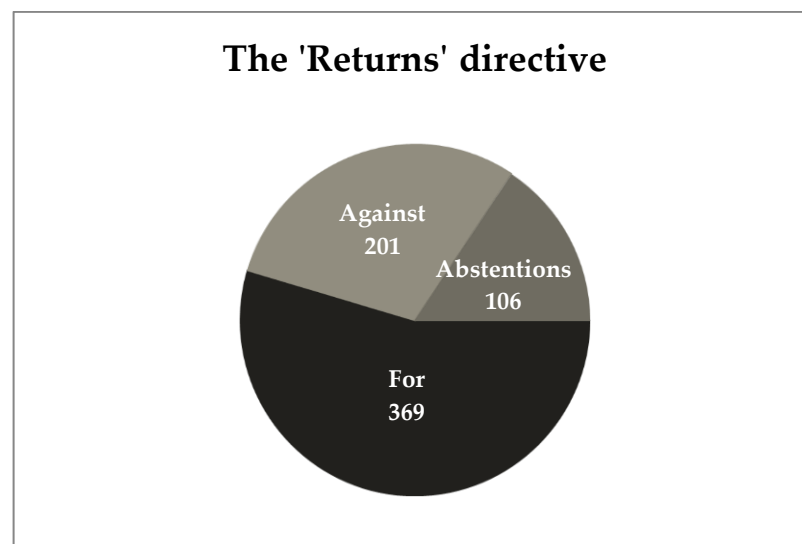
⁸⁷ Weber, interview, December 2009.

⁸⁸ Commission official C, interview, April 2011.

majorities and to know where each group stood. In this context, reaching an inter-institutional compromise became slightly risky, since the eventual agreement would get only one chance to be approved at the plenary level⁸⁹. In consequence, Portuguese and Slovenians used both technical and highly political dialogues (at the ministerial level) that helped to achieve a series of compromise proposals (Council of the European Union 2008d, 2008b, 2008c, 2008a, 2007b). The content of these compromises varied widely: while the agreements discussed in February 2008 made substantial concessions to the EP, the text drafted in March changed track and headed back towards a more restrictive position and retracted the points previously awarded to the EP (Peers 2008).

A political agreement was eventually reached in April 2008, yet almost broken again in May, when the Council attempted to draft a new compromise that could include more member states in the agreement (Council of the European Union 2008c). The presidency tried to accommodate Greece, in particular, who had problems with the provision of legal aid to TCNs⁹⁰. Eventually, the political agreement was submitted as an EPP-ED amendment for the plenary vote that took place on 18 June 2008. The report was adopted as amended with 367 votes in favour, 206 against and 109 abstentions and the legislative resolution received very similar results, with 369 votes in favour, 201 against and 106 abstentions (Votewatch 2008).

Figure 6.1.: Results of Plenary Vote



Source: Adapted from Votewatch (2008)

⁸⁹ Council official A, interview, January 2009.

⁹⁰ Hennis-Plasschaert, interview, March 2010; Commission official C, interview, April 2011.

Figure 6.1. illustrates the outcome of the vote on the legislative resolution on 18 June 2008. Table 6.1. offers a more detailed disaggregation of the votes by political group and national delegation inside each group.

Table 6.1.: Disaggregation of Votes (Returns)

	For	Against	Abstention
ALDE			
Cohesion: 51.79%	57	7	20
Belgium	3		
Bulgaria	5		
Cyprus	1		
Denmark	3		
Estonia	1		
Finland	5		
France	3	3	3
Germany	5		
Hungary	1		
Ireland			1
Italy	1	2	8
Latvia	1		
Lithuania	4		3
Luxembourg	1		
Netherlands	4		
Poland	2	2	1
Romania	6		
Slovenia	1		1
Spain	1		1
Sweden	3		
UK	6		2

	For	Against	Abstention
Greens/EFA			
Cohesion: 92.50%	0	38	2
Austria		2	
Belgium		2	
Denmark		1	
Finland		1	
France		5	
Germany		13	
Italy		2	
Latvia		1	
Luxembourg		1	
Netherlands		3	1
Romania			1

Spain		2	
Sweden		1	
UK		4	

	For	Against	Abstention
GUE/NGL Cohesion: 100%	0	37	0
Cyprus		2	
Czech Republic		6	
Denmark		1	
Finland		1	
France		3	
Germany		7	
Greece		2	
Italy		6	
Netherlands		2	
Portugal		3	
Spain		1	
Sweden		2	
UK		1	

	For	Against	Abstention
IND/DEM Cohesion: 32.50%	6	11	3
Czech Republic	1		
Denmark		1	
France	3		
Greece			1
Ireland		1	
Netherlands	1		
Poland	1		2
Sweden		2	
UK		7	

	For	Against	Abstention
EPP-ED Cohesion: 82.86%	217	1	27
Austria	5		
Belgium	2		1
Bulgaria	5		
Cyprus	2		
Czech Republic	10		
Denmark	1		
Estonia	1		

Finland	3		
France	16		
Germany	42		
Greece	10		
Hungary	12		
Italy	16		
Ireland			5
Latvia	3		
Lithuania	2		
Luxembourg	2	1	
Malta	2		
Netherlands	7		
Poland	12		
Portugal	10		
Romania	11		1
Slovakia	8		
Slovenia	4		
Spain	22		
Sweden	6		
UK	3		20

	For	Against	Abstention
PES			
Cohesion: 33.15%	33	102	49
Austria		3	1
Belgium		5	
Bulgaria		5	
Czech Republic			2
Denmark			5
Estonia		2	
Finland		3	
France		26	
Germany	13	5	2
Greece		8	
Hungary		3	6
Ireland		1	
Italy		6	5
Lithuania		2	
Luxembourg		1	
Malta			2
Netherlands		1	6
Poland	3	4	2
Portugal	1	9	
Romania		7	
Slovakia		2	1

Slovenia		1	
Spain	16	2	1
Sweden		5	
UK		1	16

	For	Against	Abstention
UEN Cohesion: 96.34%	40	0	1
Denmark	1		
Ireland	4		
Italy	11		
Latvia	4		
Lithuania	2		
Poland	18		1

	For	Against	Abstention
NI Cohesion: 46%	16	5	4
Austria	1	1	
Belgium	3		
Czech Republic	1		
France	5		1
Italy	3		
Poland			1
Slovakia	3		
UK		4	2

Source: (Votewatch 2008)

Table 6.1. clearly shows that most political groups were split and that, in consequence, the winning coalition was formed by a large number of groups. It also shows that – ideologically – the coalition was not incoherent, since it was formed mostly by groups at the right of the political spectrum and a section of the liberals (EPP-ED, ALDE and Union for Europe of the Nations [UEN]). It is also important to note that most political groups at the centre of the spectrum (liberals and socialists) were split, while those clearly situated on the right or the left side of the spectrum voted more cohesively⁹¹. The Greens, the radical left, as well as the majority of the socialist group voted against the proposal.

⁹¹ On the right side of the spectrum, 96.34 per cent of UEN voted cohesively, EPP-ED 's cohesion was at 82.86 per cent; while on the left side, the Greens presented a 92.5 per cent of cohesion and the radical left voted unanimously against (100 per cent). In comparison, ALDE only had 51.79 per cent cohesion and the socialists a mere 33.15 per cent (Votewatch 2008).

Inside ALDE and PES, some delegations decided to vote along national lines – generally those whose national parties were in government (and thus represented in the Council). For instance, among the socialist delegations, the British abstained, while the Spanish and German delegations voted in favour. In ALDE, the most reluctant to vote in favour were the French (which fitted with the national line), while the Italian delegation decided to abstain because the national party had members in both the liberal and the socialist group (which had different voting orientations – in favour and against respectively)⁹².

In terms of content, the final text depicts a bittersweet picture for the EP. Out of the six issues that became the focus of debates, four were closer to the position of the Council, while only in two cases was the EP partially successful in raising standards of protection for TCNs (Acosta 2009b). The first issue decided in favour of the Council concerned the scope of the directive – which does not offer any protection to those TCNs apprehended shortly after their irregular entry or who are refused admission at the border (Article 2). Although this outcome clearly favours member states' preferences, it was also shared by the rapporteur⁹³.

Second, the Council was also successful in downgrading the option of voluntary return, since the right to decide whether to return of one's own accord may be withdrawn or the period given to make this decision shortened. In addition, they may be ultimately sent back to countries of transit instead of their countries of origin (Article 3.3. and 7.4.). Third, member states are obliged to introduce a re-entry ban of up to five years for those subjected to a forced departure (or longer if the person is considered a public danger); bans may also be issued to those that decide to return voluntarily (Article 11). Therefore, the incentives to choose voluntary return are very much reduced, while re-entry bans might reinforce irregular immigration, given that those expelled might not have a way to re-enter the EU using regular means (Baldaccini 2009, 9).

Finally, the EP was also unable to change the modalities of detention. Although the Commission proposal was more restrictive – since it envisaged that immigrants awaiting removal would *have to* be detained (European Commission 2005, Article 14) – the current text still contains the option to detain individuals for up to 18 months, for which an administrative decision is sufficient (Article 15). Allegedly, the harmonisation of the

⁹² GUE/NGL political advisor B, interview, March 2011.

⁹³ Speiser, interview, January 2009.

detention period aimed to decrease the length of detention foreseen in some national legislation; however, in practice, the directive offers more chances to increase the length of detention than to shorten it (Acosta 2009b; Baldaccini 2009)⁹⁴.

The EP was able to raise standards in only two cases. The most successful modification provided for access to education and suitable institutions for unaccompanied minors (Article 17). Without the pressure of the EP, member states would certainly not have included such provisions (Acosta 2009b, 35). In the second case – procedural safeguards – the success of the EP was more moderate. It introduced new provisions on free legal assistance, but these provisions depend on national conditions for legal aid. In addition, the final version does not envisage an automatic *suspensive* effect during appeals; as a result, the decision to return an individual is not put on hold whilst it is reviewed and remedies are not necessarily provided by judicial bodies (Article 13).

In short, after a protracted negotiation period, the achievements of the EP were limited, especially in its attempts to raise the standards of protection. The directive is characterised by high levels of flexibility and discretion left to member states. It is thus far from the traditional EP preferences, which originally aimed to raise standards of protection. The next section tackles two different explanations that aim to understand why the EP failed to ensure higher levels of protection and why it did not push negotiations further than a first-reading agreement.

6.2. Constructing coalitions or acting ‘responsibly’?

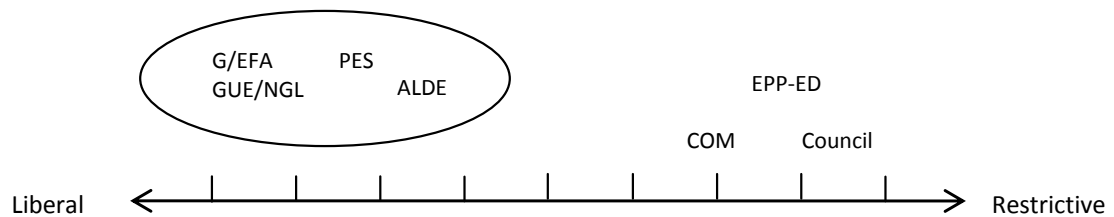
This section takes stock of the previous exposition of the directive in order to build two explanations of change in the EP policy preferences. It presents first the explanation using rationalist assumptions and later looks at the explanation based on constructivist assumptions. Once more, the objective is to compare the explanations and identify the layers and mechanisms of change as well as the points of friction and synergy between them.

⁹⁴ In fact, during negotiations (and in view of the expected outcome) some member states amended their national legislation in order to increase the length of detention. For instance, Italy proposed to up the length of detention from 60 days to 18 months in June 2008 (Senato della Repubblica 2008).

6.2.1. *Rational-choice: constructing successful coalitions*

Chapter four presented a rational-choice model based on bargaining theories, explaining change in the policy preferences of the EP as a result of shifts in the composition of winning majorities. In this scenario, political groups form coalitions inside the EP that allow them to maximise their interests in each reading of the co-decision procedure – mainly by appealing to the *ex post* veto of the EP (i.e. the power to reject after conciliation). This veto power should give some leverage to the EP when negotiating with the Council and guide the process of coalition-building inside LIBE. This section builds on these assumptions to answer three questions arising from the account of the negotiations: first, why did the EP accept a first-reading compromise; second, how did some specific political groups manage to form a winning coalition in the EP; and, finally, what was the effect of this winning coalition on the policy preferences?

In order to answer these questions, it is necessary to first look at the traditional policy preferences of the EP in the area of migration. Hix and Noury's study (2007) on the composition of EP preferences in the field of migration analysed roll-call votes of legislation on migration and integration issues passed during the EP's fifth term (1999-2004). Their research tried to determine the rationale underpinning their voting behaviour. It showed that MEPs did not follow a national economic interest – mindful of the effects that immigration could have on labour market competition in their respective national constituencies; on the contrary, their votes were determined by political motivations (that is, liberal vs. restrictive outlooks towards migrants). Their research offers a helpful overview of the positions taken by EP groups on migration issues, since it identifies a clear left-right dimension to their voting behaviour. In effect, left-wing groups adopted more liberal views on migration issues while right-wing groups tended to be more restrictive. This can be translated into a distributional line illustrating how the main EP groups in LIBE positioned themselves on this political dimension.

Figure 6.2.: Distributional Line – Traditional Preferences on Migration

Source: Hix & Noury (2007) and author's own estimations

As Figure 6.2. shows, the long-term coalition formed around issues of migration was clearly left-wing (Hix & Noury 2007, 199). In the LIBE committee, the left-wing coalition was especially pronounced, because right-wing groups such as UEN were almost absent and far-right positions were frowned upon⁹⁵. Therefore, it could be said that the traditional policy preferences of the EP were clearly liberal on migration issues, with ALDE usually voting together with PES and the Greens.

On the other hand, the existing literature shows that the Council had a long-standing preference for restrictive measures (e.g. Cholewinski 2000; Samers 2004). The Council also preferred to find solutions that reflected the lowest common denominator⁹⁶ and prioritised measures on irregular immigration instead of those on regular (labour) migration (Luedtke 2011). The initial proposals made by the Council on 'Returns' exemplify the preference of member states for minimal legislation, large room of manoeuvre left to member states, and a restrictive stance on irregular immigration (Council of the European Union 2002b).

The position of the Council also restricted the options left to the Commission. Under consultation, the Commission had to take into account the position of the Council rather than the EP's preferences, since it was up to member states to find an agreement. Even if the Commission could try to insert some of the EP's preferences as a result of its power of initiative (Varela 2009, 10), ultimately it had to propose a text that could be accepted by the Council (Acosta 2009b; Schain 2009). If one looks at the first texts issued by

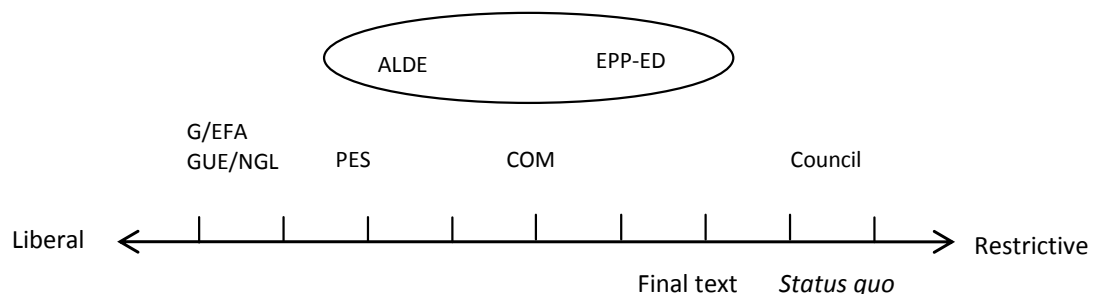
⁹⁵ MEP assistant A, interview, November 2009; Sidenius, interview, March 2011.

⁹⁶ Commission official C, interview, April 2011.

the Commission on 'Returns', they are clearly closer to the expected Council preferences on irregular immigration than to the EP's position (European Commission 2002a).

Following rationalist assumptions, preferences are exogenous to the EU decision-making system and, thus, should not have been affected by the change of decision-making procedures that followed the end of the transitional period in 2005. Figure 6.3. illustrates the position of the different actors that participated in negotiations. The EP groups represented in the circle are the main components of the winning coalition in the first-reading vote.

Figure 6.3.: Distributional Line – Preferences on the 'Returns' Directive (Plenary)



Source: Author's own estimations

As explained above, the Council was very reluctant to have a 'Returns' directive. Most member states wanted as much flexibility as possible, and few were keen to extend the scope of the directive. In fact, the Council saw the Commission's text as too protection-oriented and was keen to stick to the lowest common denominator⁹⁷. For instance, a large fraction of member states did not want to set any limits to the period of detention⁹⁸.

The Commission adopted a middle-ground position between the Council and the expected left-wing coalition inside the EP. It also tried to balance the different interests of member states. For instance, the length of detention proposed in its text (6 months) was an arithmetic average of that foreseen in the legislation of those member states that had

⁹⁷ Commission official B, interview, April 2011.

⁹⁸ GUE-NGL political advisor B, interview, March 2011. I will use the period of detention as the main example to show the position of the groups because it was the most prominent issue during the debates and negotiations. Some saw it as the "breaking point" of negotiations (Sidenius, interview, March 2001).

already set some limits in their national legislation⁹⁹. In this sense, the Commission's proposal was clearly more liberal and offered more rights to TCNs than the final outcome, a fact that some groups only realised once negotiations were well underway¹⁰⁰.

During negotiations, the EPP-ED's strategy was two-fold. On the one hand, the rapporteur tried to include all the groups, even the smaller groups such as the Greens¹⁰¹, and as a result backed issues important to the other EP groups, such as legal aid and the protection of minors¹⁰². On the other hand, Weber also tried to defend the specific positions of his group when negotiating with the Council, which gave the impression to some that he was ignoring the mandate given by the LIBE committee¹⁰³. For example, the EPP-ED was more open to accepting a longer period of detention than the six months proposed by the Commission¹⁰⁴ – especially since in Germany (the country of origin of the rapporteur) the length of detention was up to 12 months (Hailbronner 2005, 428).

The position of ALDE was expected to be quite liberal; however, since the shadow rapporteur (Dutch MEP Hennis-Plasschaert) was on the right of the liberal group¹⁰⁵, her position shifted the overall group's policy slightly towards the Council's position. ALDE wanted to ensure the success of negotiations because it considered that it was better to have some minimum common standards rather than none at all¹⁰⁶. It was especially interested in including more guarantees during the detention period, especially for unaccompanied minors¹⁰⁷. As for the length of detention, the liberals insisted on having some limits but were relatively flexible as to the exact period of time¹⁰⁸.

On the other hand, PES, Greens, and the radical left opposed the very essence of the directive, considering that TCNs should not be detained and returned¹⁰⁹. The socialist

⁹⁹ GUE-NGL political advisor B, interview, March 2011.

¹⁰⁰ Ibid.

¹⁰¹ Sidenius, interview, March 2011.

¹⁰² Weber, interview, January 2009.

¹⁰³ GUE-NGL political advisor B, interview, March 2011.

¹⁰⁴ Speiser, interview, January 2009; GUE-NGL political advisor B, interview, March 2011.

¹⁰⁵ Lemarchal; MEP assistant B, interviews, March 2010.

¹⁰⁶ ALDE political advisor B, interview, March 2011; Commission official B, interview, April 2011.

¹⁰⁷ GUE-NGL political advisor B, interview, March 2011.

¹⁰⁸ Ibid.

¹⁰⁹ Speiser, interview, January 2009; Weber, interview, December 2009; Lemarchal; MEP assistant B, interviews, March 2010; GUE-NGL political advisor B; Sidenius, interviews, March 2011; Commission official B, interview, April 2011.

group was very much influenced by the choice of shadow rapporteurs. Albeit having different styles, the two shadow rapporteurs (Adeline Hazan and Martine Roure) came from France, where the issue of irregular immigration had become extremely politicised after the 2007 Presidential Elections¹¹⁰. The socialist group was trying to find a middle ground between the liberals and the radical left; the latter tried repeatedly to swing the socialists towards a more liberal position¹¹¹. In the end, the socialist group opted for asking to reduce the length of detention to three months¹¹²; while the GUE/NGL group insisted on the principle that TCNs should not be detained (or just allow for the strict minimum time of detention to process their personal details). For them, were the directive to offer the possibility to detain an individual, it could become a political signal to member states, through which the EP would sanction detention as a legitimate option¹¹³.

As Figure 6.3. shows, the different positions of the political groups led to expect a stronger opposition coming from the EP, especially with the left-wing groups being in relative agreement that the text should be rejected. Therefore, it is important to explain why the EP did not push for a second or third reading (conciliation); further negotiations might have given it more chances to maximise its liberal preferences. It is also important to understand why a coalition between EPP-ED and ALDE was formed, instead of the more traditional left-wing coalition.

As explained in Chapter four, the EP had traditionally held more pro-integrationist positions, which made it more 'sensitive to failure' than the Council. This higher 'sensitivity to failure' could justify the decision to stop negotiations at the first-reading stage; the fear of ending up with no common standards on 'Returns' might have served as an incentive strong enough to stop negotiations at the earliest stage possible. EP groups preferred to achieve a sub-optimal result rather than ending up with no legislation at all, even if it meant failing to maximise their policy preferences. The higher levels of 'patience' shown by the Council (see Rittberger 2000) gave it an advantage and increased its bargaining strength. A more 'impatient' EP was compelled to agree to a compromise text at an early stage of the procedure, even if it was not completely satisfied with the content.

¹¹⁰ Sidenius, interview, March 2011.

¹¹¹ GUE-NGL political advisor B, interview, March 2011.

¹¹² Ibid.

¹¹³ Ibid.

This explanation resonates with accounts of those involved in negotiations. The negotiation process was long and characterised by the unstable nature of some groups, whose policy position (especially in the case of the PES) changed several times during the period of negotiation. At the beginning of negotiations, the EPP-ED thought that it would form a grand coalition with the PES¹¹⁴. It seems that the first socialist shadow rapporteur (French MEP Adeline Hazan) maintained an open-minded (albeit slightly detached) position¹¹⁵. Indeed, the report was widely supported in LIBE, which lulled the rapporteur into a false sense of security that led him to expect the formation of quite a large majority. The situation changed after the French local elections of March 2008, when Hazan left the EP and Martine Roure replaced her as shadow rapporteur. Roure took a more combative position and questioned most of the issues that had already been agreed with the Council¹¹⁶. This change in the position of the PES changed the calculations of the rapporteur, who “suddenly had his largest ally against him”¹¹⁷ and thus feared that, were negotiations to continue into a second reading, positions would diverge¹¹⁸ and he would not have enough support¹¹⁹.

Suddenly, the EP was faced with a smaller coalition, a presidency ready to question every paragraph of the compromise agreement¹²⁰ and a Council still questioning the necessity of EU legislation on returns. MEPs realised that going into a second reading was dangerous. On the one hand, the Council (and especially the incoming French presidency) might actually prefer to let negotiations fail and continue with the *status quo* (i.e. using national legislation regulating expulsion practices instead of EU common standards)¹²¹. On the other hand, most groups were afraid that the necessity to have an absolute majority (i.e. a majority of the members who comprise the EP) and the time constraints would also lead to a failure in negotiations. Even the Greens, who were opposed to the principle of

¹¹⁴ Sidenius, interview, March 2011.

¹¹⁵ Ibid.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ Commission official B, interview, April 2011.

¹¹⁹ Sidenius, interview, March 2011.

¹²⁰ EPP staff, interview, March 2011.

¹²¹ Alvaro; Speiser, interviews, January 2009; GUE-NGL political advisor B; ALDE political advisor B, interviews, March 2011; Commission official B, interview, April 2011.

returning TCNs, preferred to have some minimum standards rather than to continue with the *status quo*¹²².

The reluctance of the Council to have common EU standards and the lack of cohesion inside the EP can thus explain why the final outcome was much closer to the *status quo* in the Council than to the traditional EP preferences (König et al. 2007). In a split EP, the EPP-ED rapporteur used the EP's 'sensitivity to failure' and the shadow of a second reading to form a winning coalition at first reading. In this sense, the EPP-ED can be seen as the agent of policy change. Not happy with the traditional preferences of the EP (too far away from its own preferred policy options), it used the pro-integrationist bias of the EP and the divisions inside some political groups in LIBE to bring the preferences of the EP closer to the ideal policy position of the EPP-ED.

In this sense, ensuring that the role of rapporteur went to one of its members was a key factor for the EPP-ED, since it gave them an advantage during the bargaining process¹²³. It was this central position that made it easier for the EPP-ED to bring ALDE closer to its preferred policy preferences. Securing the support of the liberals facilitated the formation of a winning coalition capable of achieving the simple majority necessary to pass legislation at the first-reading stage. Once ALDE declared its support for the compromise agreement, the left-wing groups realised that they did not have enough support to form a winning coalition, since their groups could only gather around 40 or 45 per cent of the necessary votes¹²⁴.

The decision of ALDE to support the right-wing groups can be explained by looking at its short- and long-term time horizons. First, as explained above, in the short term, ALDE was keen to have a text which ensured some minimum common standards. Therefore, it was frustrated by the behaviour of the socialist shadows and the other left-wing groups. The liberals considered that the very specific French viewpoint with which the socialist shadows approached negotiations (very much influenced by French NGOs) could not be supported by their group¹²⁵. As a result, the only option was to join the

¹²² Sidenius, interview, March 2011.

¹²³ It seems that the report should have been given to the GUE/NGL group but, ultimately, the LIBE group coordinators agreed to give it to the EPP-ED instead (GUE/NGL political advisor B, interview, March 2011).

¹²⁴ GUE/NGL political advisor B, interview, March 2011.

¹²⁵ ALDE political advisor B, interview, March 2011.

coalition with the EPP-ED at its core, which meant being forced to take a more radical position towards the right side of the spectrum¹²⁶. Second, ALDE's decision to abandon the traditional left-wing coalition (which, if united, would have been strong enough to force a second reading) can be explained by looking at negotiations not just as a one-shot game but as an iterative game. In this case, ALDE's behaviour can be seen as a strategy to be included in future games; being a smaller political group, ALDE was afraid of being left out from future coalitions in the AFSJ¹²⁷.

Therefore, the rationalist model emphasises formal motivations for the change in policy preferences. The threat from the Council not to continue negotiations if a first reading failed, the uncertainty of the higher voting majorities of second reading, as well as the pressure to form long-term winning coalitions in an iterative game explain the lower bargaining strength of the EP and thus the motivations behind the U-turn in its liberal preferences. However, this explanation does not reveal why the liberals were so keen on being involved in the game. It also fails to answer why the socialists offered such resistance to finding a compromise, despite being in favour of EU legislation on returns. Therefore, it is necessary to look into other alternative explanations to fill the gaps left by the rationalist model.

6.2.2. Constructivism: legitimising the new patterns of behaviour

As we have seen in Chapter four, the constructivist model puts more emphasis on the 'logic of appropriateness' and informality to explain change. It examines how the policy preferences of a majority in the EP resonate with wider substantive and procedural 'meta-norms', which aim to increase the influence of the EP in the AFSJ and to ensure the protection of EU citizens. Consequently, the model assesses whether the policy preferences of the EP resonate with these 'meta-norms'. In the absence of resonance, a door opens for those policy entrepreneurs that are interested in changing the policy preferences of the EP.

As in the case of the 'Data retention' directive, the 'Returns' directive was among the first instruments to be negotiated under co-decision in the AFSJ. As a result, the importance of increasing the influence of the EP was equally translated into a promotion of

¹²⁶ Sidenius, interview, March 2011.

¹²⁷ Alvaro, interview, January 2009; Hennis-Plasschaert, interview, March 2010.

institutional ‘responsibility’¹²⁸ or ‘obligation’. In the ‘Returns’ directive, there was a similar pressure to be more “mature”¹²⁹ and adopt more “reasonable” and “realistic” positions in order to find points of encounter¹³⁰. Indeed, “due to the new atmosphere [created by the extension of co-decision], the EP wanted to succeed in finding an agreement”¹³¹; “it was not only about finding a majority but also showing some will to participate fully, get a directive and show the necessary ability to do so”¹³².

Because it was the first major text in the field of migration, the ‘Returns’ directive was perceived as “a test case for future decision making” (Honzak 2008b)¹³³. Indeed, as seen above, there was a constant doubt hanging over negotiations until the very end. It was not clear whether both the Council and the EP would find a compromise and whether they would find the necessary majorities to pass it. In the case of the Council, this was due to the reticence that most member states had towards communitarising expulsions; in the case of the EP, there was a doubt about whether some political groups would accept the change in the behaviour of the EP. As seen in Chapter four, the patterns of behaviour under consultation and co-decision are radically different; the first allowing for a more confrontational behaviour, while the latter required consensus and compromise. Indeed, LIBE reports under consultation were characterised both by adopting quite extreme positions; considered by its critics as ‘Christmas wish lists’ (European People’s Party 2009)¹³⁴ but also for being ignored by the Council¹³⁵. The introduction of co-decision was thus “a reality check for the Council – that needed to take the EP into account – but also for the EP – which could not draft reports like Christmas trees; the EP had to grow up as well”¹³⁶.

As a result, the ‘Returns’ directive forced the EP to face a crucial dilemma: it could either push for a more liberal approach but risk a rejection from the Council or it could

¹²⁸ GUE/NGL, political advisor B, interview, March 2011.

¹²⁹ Weber, interview, December 2009.

¹³⁰ Speiser, interview, January 2009; MEP assistant B, interview, March 2010; Commission official B, interview, April 2011.

¹³¹ Weber, interview, December 2009; also mentioned by Sidenius and GUE/NGL, political advisor B, interviews, March 2011.

¹³² MEP assistant B, interview, March 2010.

¹³³ Weber, interview, December 2009, Lemarchal, interview, March 2010.

¹³⁴ Speiser, interview, January 2009; Weber, interview, December 2009; Hennis-Plasschaert, interview, March 2010.

¹³⁵ Sidenius, interview, March 2011; Commission official B, interview, April 2011.

¹³⁶ Hennis-Plasschaert, interview, March 2010.

accept an unsatisfactory compromise that would, nevertheless, ensure some minimum standards. The choice was then between, on the one hand, having no text and, on the other hand, having an imperfect text but making a success of the first co-decision negotiation in irregular immigration. Clearly, the traditional policy preferences of the EP – which aimed to raise the standards of protection – did not resonate with procedural ‘meta-norms’, reflected in the ability to secure a text under co-decision – seen as a way to ensure more long-term influence of the EP in the AFSJ. This lack of resonance was used by those groups that had been excluded from policy-making under consultation to change the policy position of the committee. Principally, the EPP-ED group was the driving force behind the process of discursive entrepreneurship which, by invoking the necessity to be ‘responsible’ (i.e. to be fully effective under co-decision), convinced the other groups of the need to change their behaviour.

The increased ‘responsibility’ under co-decision required more balance in the positions of the EP – not an easy task for some MEPs¹³⁷. Fundamentally, the different ability or willingness to adapt and become more consensual was at the core of the disagreements between socialist and conservatives. For instance, after reaching a first compromise agreement in the trialogues of 23 April 2008, the conservative rapporteur (Weber) affirmed that, although the text might not be perfect, it was the best opportunity to obtain a result. He also emphasised that the “Parliament must show that it is a serious partner in the field of migration” (Weber in Honzak 2008a). At the same moment, the second socialist shadow rapporteur (Roure) affirmed that she did not see any positive aspects of the compromise agreement. She argued that “there are no positive points, because this proposal, due to the Council, is repressive. This is not a text defending human rights” (Roure in Honzak 2008c). Therefore, the positions of the groups were at opposite ends of the spectrum. While the conservatives were ready to sacrifice the content of the agreement for the sake of reaching a compromise, the majority of socialists preferred to fight for the traditional policy preferences of the EP, even at the risk of failure (Weber and Roure in Honzak 2008a, 2008c respectively).

Therefore, the LIBE committee became split along institutional lines, rather than policy lines. What divided the groups was their attitude towards the change in their behaviour rather than their different policy preferences. The dilemma raised by the misfit

¹³⁷ Council official A, interview, January 2009; Weber, interview, December 2009.

between policy and institutional preferences crossed the left-right divide. For instance, although the Greens were clearly opposed to the proposal, they decided that it was better to be engaged in negotiations¹³⁸ in order to make sure that some minimum safeguards were included in the text (especially on judicial safeguards and unaccompanied minors)¹³⁹. In fact, the Green shadow rapporteur (British MEP Jean Lambert) faced a difficult situation during negotiations because of the position of the socialists. She was willing to try to convince her group to vote at least for those amendments that introduced higher standards of protection and, if successful, to support the text¹⁴⁰. It was only the last-moment decision of the socialists to vote against the final compromise that led her to recommend a negative vote to her colleagues. However, Lambert's willingness to vote for the compromise agreement if a majority of points presented by the EP were included¹⁴¹ shows that she left aside the old confrontational behaviour and tried to fit in with the behaviour that was expected from MEPs under co-decision. In fact, a Greens/EFA political advisor considered that during negotiations on the 'Returns' directive,

"the shadow rapporteur [Lambert] learnt that it was not about influencing. It is a political choice to get your hands dirty and get involved. If you want to oppose, you might as well not negotiate because it's not worthwhile"¹⁴².

In comparison, those groups that were not ready to sacrifice their policy positions for the sake of the wider institutional interest (mainly the radical left) were perceived as outsiders of the process and as 'irresponsible' actors¹⁴³. In fact, the radical left had been in favour of having co-decision, believing it would be used to increase the standards of protection and offer more guarantees for TCNs¹⁴⁴. Therefore, it considered that it was strange to accept a political deal at first reading. Now that the EP had co-decision, it expected that the EP would use it to the full extent of its possibilities¹⁴⁵. Catania (Italian GUE/NGL shadow rapporteur) tried to convince other MEPs by declaring:

"What is more, the directive is being imposed by governments. In this Chamber we have been party to the dictatorship of the Council, which

¹³⁸ MEP assistant B, interview, March 2010.

¹³⁹ Sidenius; GUE/NGL political advisor B, interviews, March 2011.

¹⁴⁰ Sidenius; ALDE political advisor B, interviews, March 2011.

¹⁴¹ Sidenius, interview, March 2011.

¹⁴² *Ibid.*

¹⁴³ Hennis-Plasschaert; MEP assistant B, interviews, March 2010.

¹⁴⁴ GUE/NGL political advisor B, interview, March 2011.

¹⁴⁵ *Ibid.*

has said to Parliament: ‘like it or lump it’, even issuing threats against the idea of any sort of continuation of the debate on immigration. The European Parliament is passively submitting to this decision. I appeal to the dignity of European Parliament. This is not co-decision. What we are looking at is giving assent to the Council” (Catania in European Parliament 2008).

This internal division inside LIBE caused major tensions between political groups. On the one hand, those groups that were ready to compromise considered that, with their unyielding behaviour, the socialists pushed themselves out of negotiations (Weber in Honzak 2008a)¹⁴⁶; the socialist shadow rapporteur would come back time and again with the same proposals, seen as unrealistic by most and not suitable to achieve an inter-institutional compromise¹⁴⁷. Some delegations of the PES did not agree with the idea of returning irregular immigrants to their country of origin, which left them out of negotiations because “then you cannot play a major role in a dossier that deals with the return of illegal immigrants”¹⁴⁸. As one MEP assistant put it: “the socialist shadow rapporteur [Roure] did not understand the co-decision game, that is, the need to give a little bit to the Council in order to be efficient”¹⁴⁹. Similarly, the radical left, since it could not accept the idea of returning TCNs, refused to attend trialogues on a matter of principle¹⁵⁰; consequently, their amendments to the final text were seen as ‘unrealistic’ by those that had participated in negotiations¹⁵¹.

On the other hand, the socialist group protested that it had been marginalised and not informed enough by the conservative rapporteur (Roure in Honzak 2008c). Other groups also considered that the rapporteur had not strived to find a unanimous position of LIBE and that he had listened more to the interests of the Council than those of the committee¹⁵². However, with hindsight, some inside the socialist group accepted that their behaviour was a failure to adapt to the norms of co-decision. For instance, a PES political advisor affirmed that the directive had been one of the most negative experiences for the socialist group, since they had been unable to convince the other groups to include any of

¹⁴⁶ Hennis-Plasschaert, interview, March 2010.

¹⁴⁷ Speiser, interview, January 2009; Hennis-Plasschaert; MEP assistant B, interviews, March 2010.

¹⁴⁸ Speiser, interview, January 2009.

¹⁴⁹ MEP assistant B, interview, March 2010.

¹⁵⁰ GUE/NGL political advisor B, interview, March 2011.

¹⁵¹ Speiser, interview, January 2009; MEP assistant B, interview, March 2010.

¹⁵² GUE/NGL political advisor B, interview, March 2011.

their amendments in the EP report¹⁵³. Indeed, as mentioned above, the socialists even failed to find a common position inside the group, and a large proportion of socialist MEPs abstained or even voted in favour of the compromise agreement (see Table 6.1.). These divisions were due to pressure from national governments (where the national party also seated in Council)¹⁵⁴, but also due to different understandings of the procedures, that is, between those that accepted the new rules of the game and those that did not¹⁵⁵.

Identifying the mechanisms of discursive entrepreneurship is especially relevant to understand ALDE's decision to form a coalition with the EPP-ED. In the past, the liberals had been very vocal in their protection of civil liberties, voting more often with the left-wing groups than with the conservatives (Hix & Noury 2007)¹⁵⁶. During negotiations on the 'Returns' directive, they seemed to abandon this long-term practice for the sake of compromise. Liberal MEPs acknowledged that the directive was not completely to their liking¹⁵⁷, but it seems that the group prioritised the need to find an agreement. ALDE wanted to show that it could behave 'responsibly'¹⁵⁸, even if it came at the expense of their policy preferences. This decision came as a surprise to other LIBE groups. The PES, for instance, was convinced that it could propose some substantial amendments to the proposal in order to raise the standards of protection and count on the support of the liberals, because "they could possibly not oppose to the content of the amendments"¹⁵⁹.

There, the size of the group seems to have been a powerful argument to convince ALDE members of the necessity to change their behaviour and adapt to co-decision¹⁶⁰. As mentioned above, the fear of being left out from negotiations by the larger groups made its members more receptive. It convinced them of the necessity to change their position in order to participate fully in negotiations. As the shadow rapporteur confirmed: "for ALDE it was a victory to be in the coalition; it was important to be influential in negotiations and be part of the majority"¹⁶¹. This unease resonated with previous co-decision negotiations in

¹⁵³ Lemarchal, interview, March 2010.

¹⁵⁴ Sidenius; GUE/NGL political advisor B, interviews, March 2011.

¹⁵⁵ Sidenius, interview, March 2011.

¹⁵⁶ Speiser, interview, January 2009; MEP assistant A, interview, November 2009; Lemarchal, interview, March 2010.

¹⁵⁷ Alvaro, interview, January 2009; Hennis-Plasschaert, interview, March 2010.

¹⁵⁸ Hennis-Plasschaert, interview, March 2010.

¹⁵⁹ Lemarchal, interview, March 2010.

¹⁶⁰ Hennis-Plasschaert, interview, March 2010.

¹⁶¹ Ibid.

LIBE, where first-reading agreements had been encouraged by leaders of the larger political groups and had, as a result, marginalised ALDE in negotiations (see Chapter five). As a consequence, both the liberal shadow rapporteur (Hennis-Plasschaert) and the LIBE chairman (Belgian ALDE MEP Gérard Deprez) followed negotiations very closely¹⁶². Deprez, in particular, adopted a more institutional role, which tried to balance the interest of LIBE – ensuring that the rapporteur would stick to its mandate – with the long-term interests of the EP. In this sense, he considered it was important to deliver a compromise so that “more co-decision would come their way”¹⁶³.

As seen in Chapter five, the ‘Data retention’ directive had been an institutional and policy learning curve, since the opinion drafted by the ALDE rapporteur (anchored in the traditional EP policy preferences) had been by-passed by EPP-ED and PES political leaders. Since, back then, the reasons for marginalising LIBE and its liberal rapporteur were rooted in the necessity to be more ‘responsible’¹⁶⁴, ALDE was especially interested in demonstrating that it had learnt the lesson – it “wanted to make sure that it was seen as a reliable negotiator”¹⁶⁵. As a result, once it was clear that a left-wing coalition would not work, the liberal shadow rapporteur made sure that there would be a compromise, even taking the lead over negotiations and trialogues¹⁶⁶.

The dividing lines inside LIBE were amplified by the discourse of the Council. The Slovenian Presidency appealed to the general reticence of member states towards the directive to convince MEPs of the necessity to accept the proposed compromise. The inter-institutional agreement reached in the final trialogue was presented to the plenary as a ‘take-it-or-leave-it’ option: “[a]ny kind of revision or amendment to this text will signify a disagreement on the part of the Council, which of course will mean non-adoption of the directive at first reading” (Mate in European Parliament 2008a). Indeed, those involved in negotiations felt that if they continued to push, the Presidency could at any moment refuse to introduce further changes by saying:

“‘listen guys if you are coming with such unrealistic proposals and unrealistic demands, we just give up on it, because the current situation is not problematic for us [member states], we don't need at all price this

¹⁶² MEP assistant B, interview, March 2010; Sidenius, interview, March 2011.

¹⁶³ ALDE political advisor B, interview, March 2011.

¹⁶⁴ EP official B, interview, March 2010.

¹⁶⁵ ALDE political advisor B, interview, March 2011.

¹⁶⁶ Sidenius; ALDE political advisor B, interview, March 2011.

European harmonisation. We keep people in prison as long as we like, we send home who we like and in which way we like and as long as this is in accordance with our own constitutions, don't bother us'''¹⁶⁷.

Evidently, this strategy reinforced the discourse adopted by those groups that favoured an agreement and that wanted the EP to adopt a more 'pragmatic' behaviour. In the end, it was the common front adopted by the rapporteur, the Presidency and the Commission that managed to convince other groups in the EP that it was the best possible compromise¹⁶⁸.

The Slovenian Minister also appealed to the idea of the 'Returns' directive as a crucial test for future negotiations. He sent a clear signal by proclaiming:

"However, that is not the only consequence if this directive is not adopted. Another consequence is that it will affect other directives we adopt in the co-decision procedure, for which the method of negotiation such as was implemented in this procedure could be a good example (...). I think the path that we have mapped out is the right one and that in this way we will be able to function" (Mate in European Parliament 2008a).

Such discourses coming from the Council, were in turn used by the rapporteur to convince the rest of the Parliament that it was necessary to accept the first-reading agreement reached with the Council, even if it was far away from the EP's traditional policy preferences. Before the votes, he declared:

"This was a complex and very emotional topic that many people in Europe feel very strongly about, and it involved using a new procedure, the codecision procedure, so thank you. Within the Committee on Civil Liberties, Justice and Home Affairs we had the support of a large majority for our suggestions for a solid, workable proposal. As a parliament, we are *capable of reaching consensus*. (...) If you vote against this Directive, if you vote against this trialogue result, you are preventing the European Union from making any progress in improving the standards of these human rights. Therefore, I would ask, please, that we *show ourselves capable of acting*" (Weber in European Parliament 2008a, emphasis added).

The discourse was effective in convincing those groups that had reservations in regard to the content but were aware of the difficulties undergone to reach the compromise agreement. The liberal shadow rapporteur adopted a very similar discourse by concluding that:

¹⁶⁷ Speiser, interview, January 2009.

¹⁶⁸ Council official A, interview, January 2009.

“The compromise package should be seen as a very modest but important first step. The return policy cannot be looked upon in an isolated way, but should be seen as a necessary part of a total package on migration, including legal, as well as asylum. Indeed, in my view, after almost three years of debate and negotiations, it is high time to take up our *responsibility*” (Hennis-Plasschaert in European Parliament 2008a, emphasis added).

In turn, the discourse emphasising a pragmatic and more ‘responsible’ behaviour put pressure on the socialist group, which fractured into two positions. Some delegations (mostly the Spanish, German and British, whose national parties were in office at that point) were convinced of the necessity to be more consensual¹⁶⁹. As Weber expressed it: “these delegations saw [the compromise text] in a more realistic way”¹⁷⁰. However, the different discursive entrepreneurs failed to sway the core of the socialist group, whose shadow rapporteur maintained the behaviour traditionally held by LIBE. The old confrontational behaviour was clear to see in her declarations in plenary, where she concluded with the following plea:

“My group does not accept the compromise that the Presidency and the rapporteur laboriously arrived at, not because we are opposed to a European return policy but because we feel that the result is very inadequate as regards protecting fundamental rights. (...) That is why the Socialist Group in the European Parliament tabled a limited number of amendments aimed at establishing a human dimension to this text. This is the first codecision of the European Parliament on the fight against illegal immigration and that is why we have a duty, as MEPs, to champion clear legislation that is not subject to different interpretations by Member States or rulings by the Court of Justice. That is also why I am calling on the European Parliament to make use of every legislative power at its disposal to allow the adoption of legislation that will improve the lot of detainees. That is our duty as MEPs” (Roure in European Parliament 2008a).

Therefore, the necessity to legitimise the new patterns of behaviour offered a chance to those actors that had been previously marginalised from decision-making in the AFSJ to engage in a strategy of discursive entrepreneurship. By using discourses that resonated with the wider procedural ‘meta-norms’, they legitimised the policy change. In the end, the battle between “idealists” and “realists” was resolved in favour of the latter, who were able to convince key groups of MEPs and to find a majority¹⁷¹. For an EPP-ED political advisor, “the outcome for [his] group was excellent because you can easily see the handwriting of

¹⁶⁹ Speiser, interview, January 2009.

¹⁷⁰ Weber, interview, December 2009.

¹⁷¹ Commission official C, interview, January 2009.

the very moderate, realistic and reality-orientated EPP-ED group”¹⁷². ALDE, being a comparatively smaller group, was concerned with losing its voice under co-decision and thus accepted the rules of the game more quickly, even if it came at the expense of its policy preferences. Those, such as the majority of the PES or the radical left, that did not adapt their policy positions in order to fit in with the institutional paradigm, became outsiders in the process; in the new institutional context created by the shift to co-decision, their behaviour was suddenly deemed as unsuitable.

Conclusion

The ‘Returns’ directive was presented by those that voted in favour of it as a better alternative than the *status quo*. Certainly, outcomes were less restrictive than if the decision had been left to the Council; however they did not fit either into the liberal image portrayed by the EP (and especially by the LIBE committee) under consultation. The EP managed to pass a compromise text that introduced common minimum standards regulating the conditions and safeguards of those TCNs forced to return to their countries of origin or transit. However, the directive leaves substantial room for manoeuvre to member states and does not cover a significant proportion of those detained and expelled from the territory. More importantly, it legitimises certain practices – mainly the possibility to detain those awaiting expulsion – that had been questioned and heavily criticised before the adoption of the directive.

The ‘Returns’ directive is, thus, a clear example of the change in the policy preferences of the EP. From being critical with the idea of returning immigrants and creating detention centres, it accepted a text that legitimised these practices and upped the detention period to a maximum of 18 months. It is therefore essential to understand how such a U-turn in the position of the EP was possible in a period of only three years. This chapter has used two theoretical models to explain why the EP accepted a first-reading agreement (instead of pushing for further negotiations) and why the traditional left-wing coalition was unable to form a majority. The two models have pointed out different factors and synergies behind these two questions.

¹⁷² Speiser, interview, January 2009.

The rationalist model has shown how the formal aspects of co-decision can explain why the EP accepted a first-reading agreement instead of pushing negotiations until conciliation. The EP's 'sensitivity to failure' was powerful enough to prefer a sub-optimal outcome. Although the final compromise did not reflect the main preferences of the EP, it managed to raise the standards vis-à-vis the *status quo* (national legislation and no common rules). The model also highlights the bargaining strength of the rapporteur during coalition-building. The fact that the rapporteur was a conservative MEP gave an advantage to the EPP-ED, since he could transform the EPP-ED's policy preferences as the default EP position. This shift was important, since the group's preferences were more similar to the Council's *status quo* than the EP's traditional preferences.

On the other hand, the constructivist model offers an additional explanation not only of how change in the policy preferences happened but also on why it was so readily accepted by most political groups. It underlines the necessity to frame policy change in a broader institutional context filled with specific understandings and norms of behaviour. In the case of co-decision, these norms of behaviour require compromise and a sense of 'responsibility', i.e. the capacity to bear the consequences of legislation passed on an equal footing with the Council. Only when policy preferences resonate and fit into this broader institutional context are they seen as legitimate enough to become the mainstream preference of the institution.

In the case of the 'Returns' directive, once the liberal position of the EP on immigration issues started to create frictions with the new norm of consensus required under co-decision, the liberal paradigm lost the legitimacy that it had enjoyed previously and started to be seen as an obstacle. At that point, it was easy for actors willing to downplay the liberal tone of the EP – mostly EPP-ED members and the Council presidency – to use institutional arguments in order to change the EP's position. As seen above, they used a specific language that resonated with the institutional interests of most political groups. They called for a more 'responsible' and 'pragmatic' behaviour that could ensure the trust of the Council and argued that only with more 'mature' behaviour would the EP succeed in participating fully in those AFSJ issues subject to co-decision.

In consequence, rationalism and constructivism both provide useful explanations for the change in the EP's policy preferences. However, they highlight different logics and layers of change. While rational-choice institutionalism might be able to explain bargaining

and coalition formation as well as individual decisions, constructivist explanations might give us a better understanding of what makes certain choices acceptable or why specific coalitions and outcomes do (or do not) occur. As a result, the empirical analysis identifies two different layers of institutional change: a formal layer emphasising the importance of rules (such as the higher majorities required in the EP for the second-reading vote) and an informal layer appealing to common understandings of behaviour (namely, consensus and responsibility) that legitimise certain choices.

On the other hand, these different layers are not disconnected; formal and informal explanations reinforce the 'directionality' of change, which is crucial to understand why the change in policy preferences could be effectuated so rapidly and presented as a more legitimate option. In terms of 'directionality', ALDE's behaviour exemplifies how rationalist and constructivist explanations can complement each other. In this case, both formal and informal layers reveal the necessity to change the policy preferences of the group in order to be more effective under co-decision. The fact the two layers followed a cumulative rather than a competitive dynamic explains why such a move was hardly contested inside the political group. ALDE's willingness to be part of the winning coalition can be explained as a rational calculation in an iterative game; since co-decision was the new rule of decision-making in the AFSJ, an early exclusion from bargaining could have had long-term consequences. The change, however, could only be accepted and consolidated in the new normative context, which prioritised success in the institutional dimension at the expense of its long-term policy preferences.

The behaviour of ALDE reflects the ultimate nature of the compromise agreement. The 'Returns' directive has turned into a 'poisoned chalice'; most observers agree that it is a better option than the previous *status quo* – the directive offers at least some minimum standards and ensures the respect of some minimal rights for TCNs. At the same time, the adoption of the directive legitimised certain principles that were not as evident as they might seem today. Issues such as the ability to detain irregular migrants – or even the possibility to expel them from the territory – have become normalised in European debates. This common use of detention reinforces the link between TCNs and criminality and it might prove extremely difficult to unravel in the future.

Chapter 7: The SWIFT Agreement

Introduction

The last two chapters concentrated on the impact of co-decision on the policy preferences of the EP. This chapter¹⁷³ changes tack and introduces a new decision-making procedure (consent, previously named 'assent') in order to compare it with co-decision. The objective is to determine whether the change in the policy preferences of the EP is only a product of co-decision or whether it reflects wider processes of institutional change. The chapter starts by comparing the formal structure of the consent procedure with consultation and co-decision in order to define the patterns of behaviour expected from MEPs when they accept or reject an international agreement.

Once the procedure has been explained, the chapter examines in more detail the SWIFT Agreement (European Union 2010), the first international agreement ratified after the entry into force of the Treaty of Lisbon. The SWIFT Agreement aimed to facilitate the transmission of bank transfers data to the US for the purpose of investigating terrorism. The Agreement raised high expectations because it was the first in which the EP could give its consent to an international agreement dealing with internal security matters, offering a new opportunity to raise data security standards in this field. It was also perceived as an opportunity for the EU to achieve a more reciprocal relationship with the US in counter-terrorism matters. In past agreements, the EU had found itself between a rock and a hard place by the US and had ultimately accepted American security standards (Argomaniz 2009). For instance, during negotiations on PNR, the US had requested data from EU companies that contravened European data protection legislation. Being on the weaker side, the EU had buckled under US pressure and accepted their conditions (Guild & Brouwer 2006). Contrary to past agreements, the EU had an advantage over the US in the case of SWIFT, since data on bank transfers was on EU territory and the US were on the requesting side.

¹⁷³ The interviews done during July 2010 were effectuated with Alex MacKenzie, PhD candidate working on the external dimension of EU counter-terrorism at the University of Salford.

Despite all the hopes, the first (interim) SWIFT Agreement respected all of the US' red lines and, given the EU's leverage, it did not include as many data protection safeguards as it was originally hoped for. On 11 February 2010, the EP made use of its power of consent and rejected the Agreement, justifying its decision on the basis of its traditional policy preferences in favour of high data protection standards. The rejection of the Agreement by the EP in February 2010 represented a shock for both member states and the US and sparked an intense re-negotiation of the Agreement – eventually accepted and ratified in July 2010. In view of the EP's grounds for rejection, one would expect a radically different agreement after the re-negotiations; yet, the two versions of the Agreement are not inherently different.

SWIFT is a good case study to examine the impact that a modification in the decision-making rules had on the policy preferences of the EP. In fact, SWIFT is a particularly interesting episode because the shift of preferences occurred in the space of only five months. Consequently, the key actors remained the same and there were few external factors or surrounding events that could interfere in the change of preferences. Compared to the extension of co-decision, the extension of the consent procedure occurred in a more neutral context. By the end of 2009, the Madrid and London terrorist attacks were less salient as in 2005. The isolation from external factors is even higher than in the previous case studies. There is only one external factor – the role of the US – that can be considered essential to explain the process, but (as it will be shown later) its impact can be easily endogeneised.

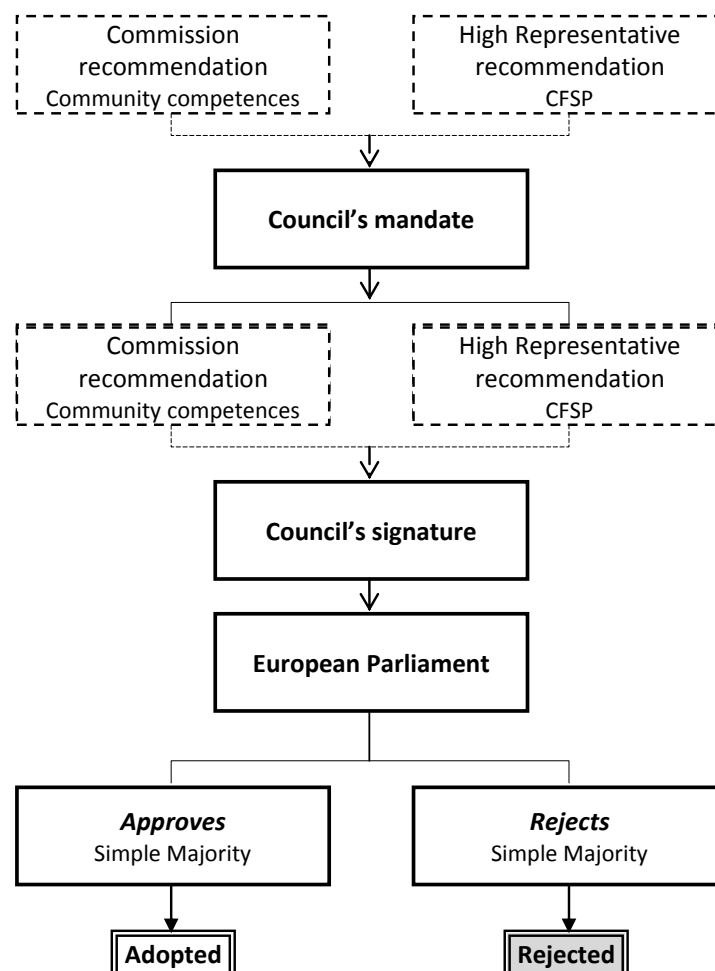
In consequence, this chapter examines the SWIFT Agreement in order to compare the shift to co-decision with a similar process of institutional change that came as a result of the major extension of the consent procedure to most policy areas. The first section explains the consent procedure by comparing it to the consultation and co-decision procedures. The second section explains the two stages of the SWIFT Agreement: the negotiations culminating in the rejection of the agreement and the subsequent re-negotiation to reach a permanent agreement. The third and final section applies the models of policy preference change under co-decision to see whether they still hold any explanatory power when used for the consent procedure. The explanations derived from the models show that their explanatory value relies on the transformation of the consent procedure and that both

rationalist and constructivist mechanisms offer partial explanations to the adjustment in the EP's patterns of behaviour.

7.1. Patterns of behaviour under the consent procedure

The consent procedure is a simple mechanism used mostly for the ratification of international agreements. Under the Treaty of Lisbon, Article 218 TFEU indicates that the Council adopts a mandate after recommendation of the Commission or the High Representative (depending on the legal basis of the agreement). The mandate is used as a guideline by the EU negotiators (Commission or High Representative) and the final agreement is signed by the Council. Once signed, the EP has the right to give or withdraw its consent to the agreement, generally with a simple majority.

Figure 7.1.: The Consent Procedure (Ratification of International Agreements)



Source: Author

As seen in Chapter three, the formal structure of the different decision-making procedures gives rise to particular patterns of institutional behaviour that shape and guide the actions of MEPs.

Table 7.1.: Patterns of Behaviour at the LIBE Committee

Patterns of behaviour at the LIBE Committee			
	Inter-institutional relations	EP political groups	Policy outcomes
Consultation	'Irresponsible'	Flexible coalitions	Centrifugal
Co-decision	Consensual	Grand / stable coalitions	Centripetal
Consent	Ambivalent	Ad-hoc	Disempowered

Defining the patterns of behaviour of the consent procedure is not an easy task. As is the case with the consultation procedure, there is not an abundance of literature examining the consent procedure. Most of this literature dates back to the aftermath of the Single European Act (SEA), when assent to international agreements was introduced for the first time. Since then, the consent procedure has mostly been used in Association or Accession agreements with the European Union. Figure 4.2. (see page 60) illustrated the quantitative difference between the assent (consent) procedure and the other two legislative procedures (consultation and co-decision). The infrequency of its use has led the literature to overlook it. Therefore, the patterns of behaviour have to be deduced from the small number of references in the literature and by comparing it to the other procedures.

Until the entry into force of the Treaty of Lisbon, the EP had never made use of its veto power under the assent procedure. Just after the SEA, the EP threatened to reject three sets of agreements with Israel; Syria and Morocco; and Turkey, but accepted all three agreements after some changes were introduced (Corbett et al. 2005, 235-236). In practice, the EP proved reluctant to use its power of assent because saying 'no' to enlargement or to Association Agreements would have had a negative symbolical impact (Judge & Earnshaw 2008a, 235-236). Similarly, it also adopted a constructive attitude when giving its assent to major reforms or constitutional decisions (W. Wessels & Diedrichs 1997, 8). In this sense, the nature of the agreements makes it difficult to generalise the patterns of behaviour developed under the assent/consent procedure.

In terms of inter-institutional relations, Chapter four has shown how consultation creates incentives to free-ride for the LIBE committee; the lack of effective decision-making power opens a door to engaging in confrontational relations with the Council – without having to care about the consequences. In comparison, co-decision requires MEPs to engage in strategies of compromise and consensus-finding in order to be effective. The idea of ‘responsibility’ weighs heavily on the shoulders of the committee, restricting its autonomy.

The impact of the consent procedure on inter-institutional relations is based on ambivalence. The procedure gives more power to the EP, since it can use the procedure as a ‘nuclear’ power (J. Smith 1999, 76). With a negative vote, it can end all negotiations and force the Commission to abandon the international agreement or re-negotiate it. In a way, the consent procedure is a more ‘absolute’ power: the EP can give all or take all, but nothing in-between. Consequently, there is as much scope for confrontation as there is for compliance. Garrett (1995, 300), however, noted that, given its integrationist bias, the EP will be reluctant to use its veto power under the consent procedure if the text is more integrationist than the *status quo*. Indeed, in the past, the EP has proved reluctant to use its ‘nuclear’ power when giving its assent to Association agreements and especially Accession treaties. However, the procedure has the potential to be equally destructive and can potentially transform the EP into the most powerful veto-power.

Similarly, while the different voting majorities are a key factor in determining the flexibility of the EP groups when building coalitions (more flexible under consultation; more prone to grand and stable coalitions under co-decision), the situation is rather unclear in the case of the consent procedure. On the one hand, the procedure requires different voting majorities depending on the type of international agreement. For instance, sanctions on a member state due to a breach of fundamental EU principles have to be passed with a qualified majority of two-thirds of its members (Rule 74e in European Parliament 2010b, 51), while international agreements based on the ordinary legislative procedure require a mere simple majority (Rule 81 in European Parliament 2010b, 56-57). On the other hand, international agreements do not occur with the same regularity as internal legislation. In consequence, it may prove difficult for political groups to create stable patterns of coalition-building under the consent procedure.

Finally, in terms of policy outcomes, the consent procedure is also substantially different from the other two procedures. Consultation tends to shift policy outcomes towards the extremes. For instance, the policy preferences of Council and LIBE in the AFSJ have been traditionally situated at the two opposite poles of the restrictive-liberal dimension. In comparison, co-decision, with its norm of consensus, pushes policy outcomes towards the centre of the political spectrum. The consent procedure is substantially different to the other two procedures because the EP has – formally – no capacity to change the content of the agreements. Its power – albeit absolute – is reduced to accepting or rejecting a ready-made text. It is thus purely a ‘take-it-or-leave-it’ option that leaves MEPs disempowered during negotiations, i.e. without a say in the direction of policy outcomes.

In conclusion, the consent procedure gives rise to particular patterns of behaviour that – despite being generally ambivalent – differentiate it from the other two procedures. It is in this framework that the negotiations for the SWIFT Agreement developed, at least until its rejection in February 2010. The following section will map the political context in which negotiations started as well as the events of winter and spring 2010.

7.2. SWIFT: The Start of a New Age?

The rejection of the first SWIFT Agreement in February 2010 came as a surprise to all involved. Previous EU-US agreements on internal security needed only the signature and ratification of the Council. In consequence, both sides were used to cooperating and reaching successful outcomes and thus neither had expected a negative outcome. The absence of rejections under the assent procedure had also led the Council to consider the EP’s ratification as a formality. As mentioned above, this pattern reflected the aversion of the EP to use a ‘nuclear’ power that could jeopardise advances in European integration. In consequence, in order to understand the rejection, the SWIFT Agreement needs to be set into a broader political and institutional context. This section explains the importance of SWIFT, its past relations with the EP and the consequences this legacy bore on the 2009-2010 negotiations.

SWIFT was not a new topic when negotiations started in 2009. The EP had been battling it out since 2006, when news of the use of SWIFT data came to the public light. The

use of this data goes back even further to the aftermath of 11 September 2001. After the terrorist attacks in New York, the US Department of the Treasury (UST) developed a new counter-terrorism programme – the Terrorist Financing and Tracking Programme (TFTP) – which used data on international bank transfers. These data were used to obtain leads on individuals suspected of being linked to terrorist financing. In order to make the system functional, the UST compelled the *Society for Worldwide Interbank Financial Telecommunications* (SWIFT) to provide its data on international bank transfers. The Belgian company specialises in facilitating this kind of transfers and dominates the market – since it is responsible for about 80 per cent of its global activity (Deutsche Welle 2010). The UST planned to cross the information provided by SWIFT with that of other agencies, such as the National Security Agency (NSA) or the Central Intelligence Agency (CIA). Since SWIFT data contain personal information on both payer and payee (González Fuster et al. 2008), the UST thought it could be used to identify suspicious individuals – instead of suspicious transfers¹⁷⁴.

The UST used subpoenas (compulsory administrative orders to provide information) to request SWIFT data (González Fuster et al. 2008). The use of subpoenas was possible because the company had established a mirror server in Virginia, that is, on US soil. The server was essentially a technical measure to secure the original data stored in the European server, based in the Netherlands. Since, under US law, it is compulsory to comply with subpoenas, SWIFT had no other option but to transfer its data; however, it managed to negotiate the scope and conditions for such transfers (González Fuster et al. 2008, 193). In 2004, SWIFT introduced some improvements, such as the use of its own ‘scrutineers’ (or overseers) (Bruguière 2010) in order to monitor that requests were related to terrorism and that they referred only to individuals in a ‘watchlist’ – not people involved in a judicial process¹⁷⁵.

US usage of SWIFT data was only revealed on 23 June 2006 by the New York Times (The New York Times 2006). This came as a surprise “almost for everybody” (González Fuster et al. 2008, 194) and raised several questions about the US processing of data and data protection legislation. These concerns were partially placated by an exchange of letters between the EU and the US, in which the UST offered unilateral commitments regarding

¹⁷⁴ EP official A, communication, March 2010.

¹⁷⁵ Ibid.

data protection (Office of Foreign Assets Control, US Department of the Treasury 2007). The US also allowed the European Commission to designate an 'eminent person' to oversee the use of SWIFT data (Office of Foreign Assets Control, US Department of the Treasury 2007, 60065). From March 2008, French counter-terrorism judge Jean-Louis Bruguière investigated the use made by the US of SWIFT data subpoenaed for the purpose of the TFTP. Two confidential reports ensued in December 2008 and January 2010 – both underlining the usefulness of the programme and the vigilance with which the US had handled data obtained from SWIFT (Bruguière 2010; European Commission 2009).

During this time, the EP repeatedly denounced the use of SWIFT data by the US and put pressure on the company to stop handing its information to the UST (SWIFT 2007a; European Parliament 2007c). As a result, the company decided to stop using the Virginia server as a back-up and created a 'Distributed Architecture' – namely two clearly separate messaging zones with the US and the EU at the core of each zone (SWIFT 2007b). SWIFT also built a new back-up server for its European data in Switzerland. In practice, this meant that the European data would not be on US soil and therefore the US government could no longer use subpoenas to obtain the data stored in the European servers (Monar 2010c, 144).

However, the US considered that it remained essential to obtain data on transfers between European banks and, more importantly, information on transfers between Europe and the rest of the world, especially with key countries such as Pakistan, Iraq or Sudan – which chose to be included in the European messaging zone¹⁷⁶. In order to have an uninterrupted access to this information, the US had two options: either opt for formal judicial cooperation with EU member states or sign an EU-US Agreement specifically on TFTP (Occhipinti 2010, 137). The latter was certainly seen as a better and easier option by the US; EU member states also viewed the Agreement as a crucial instrument to ensure their national security. The TFTP system had been used by EU member states to outsource the analysis of SWIFT data to the US, which – contrary to the EU – had the technology to analyse the data and use it to find useful leads (Argomaniz 2009, 129).

Therefore, in June 2009, the EU and the US started discussions on an international agreement that would give the US access to European servers. With the future of the Treaty of Lisbon remaining unclear, the Council and the Commission decided to negotiate only an interim agreement (European Parliament 2009b). With a view of giving MEPs a say on the

¹⁷⁶ Diplomatic source A, interview, March 2010.

content, the conclusion of a permanent or long-term agreement was put on hold until the entry into force of the Treaty of Lisbon. On 27 July 2009, the Council gave a negotiating mandate to the Presidency and the Commission (Council of the European Union 2010a). However, it was not until September 2009 that more intensive negotiations started. Being a third-pillar agreement, the Swedish presidency took the lead.

Although SWIFT was not new to the EP, negotiations started shortly after the 2009 EP elections, which meant that most MEPs were unaware of how the TFTP system functioned (Berès & Deprez 2009). The LIBE committee started gathering information very quickly (EDRI 2009a; López Aguilar & Pennera 2009) and on 17 September 2009 issued its opinion on the draft agreement (European Parliament 2009b). In the resolution, the EP took a firm stance towards the agreement and raised a number of concerns that would be at the core of the disagreements with the Council and the US in the months to come. It questioned the necessity and proportionality of the instrument (points 1 and 3); raised doubts about the purpose limitation of the definition of terrorism¹⁷⁷ (point 7.a.); strongly criticised the use of ‘bulk data’¹⁷⁸ without judicial authorisation (point 7.c.); and pointed out the absence of judicial review when the legality and proportionality of the transfers was questioned (point 7.d.). These points coincided with the US red lines and thus were difficult to reconcile¹⁷⁹.

Bearing in mind these diverging interests between the Council and the EP, the Swedish presidency started negotiations with the US. Between September and November 2009, the presidency was very proactive and held several meetings with the EP rapporteur (Hennis-Plasschaert, Dutch ALDE MEP)¹⁸⁰. During those meetings, the rapporteur seemed ready to accept the on-going negotiations as a good basis for agreement¹⁸¹. Yet, the spirit of

¹⁷⁷ They wanted to use the EU definition as set out in the *Council Framework Decision 2002/475/JHA of 13 June 2002 on Combating Terrorism as Amended by the Council Framework Decision 2008/919/JHA of 28 November 2008*, which mentioned the ‘incitement’ to commit terrorist acts. The issue of ‘incitement’ has always been problematic in the US due to freedom of speech, enshrined in the first amendment of the US Constitution (EU official, interview, March 2010). The EP also wished to limit the transfer of data related to individuals and terrorist groups recognised as such by the EU.

¹⁷⁸ Bulk data refers to personal data transferred *en bloc*. It usually relates to a ‘pull system’, i.e. a system where the US can access information without any previous filters. In contrast, a ‘push system’ requires a previous request for specific data that is then transmitted to the US on a case-by-case approach.

¹⁷⁹ EU official; Commission official E, interviews, March 2010.

¹⁸⁰ Hennis-Plasschaert; Diplomatic source A, interviews, March 2010; EU official, interview, July 2010.

¹⁸¹ EU official, interview, July 2010.

cooperation ended with the news that the presidency was planning on signing the Agreement before the entry into force of the Treaty of Lisbon on 1 December 2009.

The EP considered that if the Agreement was signed before Lisbon, Parliament would only have the possibility to accept it or reject it, but it was not able to contribute to the content of the agreement. In view of these rumours, the EP's President Jerzy Buzek sent a letter to Sweden's Prime Minister Fredrik Reinfeldt on 26 November 2009 (European Parliament 2009b, 11). In the letter, Buzek asked Reinfeldt to postpone the vote in the Council so that the EP would have a chance to modify the content of the agreement. Reinfeldt's negative response turned the issue into "a matter of honour and respect"¹⁸².

In consequence, the eventual signature of the interim agreement on 30 November 2009 sparked the fury of the EP. Sweden justified the decision to sign it one day before Lisbon on legal grounds. The presidency considered that if the interim agreement was not signed that day, the mandate given under Nice rules would expire and it would have to be renegotiated. This could potentially jeopardise the chance of having an agreement before the relocation of the SWIFT server to Switzerland (Euractiv 2009a), due on 1 January 2010. In order to appease the EP, Reinfeldt assured that "the Parliament [would] be called upon to give its consent before the agreement [could] be concluded" (Buzek 2010). Despite these promises, the EP remained sceptical.

This scepticism was reinforced during the month of January 2010 by two other factors. First, the EP only obtained the official text of the Agreement on 25 January – although the Agreement was to be provisionally applied from 1 February¹⁸³. The Commission and the Council claimed that the late transmission was due to delays in the translation and the Christmas break (Euractiv 2010a). In practice, it meant that the LIBE committee had less than a week to examine the content of the Agreement and produce a recommendation. Second, the performance of the Spanish presidency did not help to assuage the fears of MEPs. For instance, the rapporteur felt that the Spanish presidency

¹⁸² Diplomatic source A, interview, March 2010.

¹⁸³ The provisional application of the agreement was delayed until 1 February 2010 to coincide with the entry into force of the *EU-US Mutual Legal Assistance Agreement (MLA)*, which had been used as the legal basis for the SWIFT agreement (EU official, interview, March 2010; European Union 2003; Council of the European Union 2009).

waited too long to talk to her¹⁸⁴ and, generally, its representatives appeared poorly prepared when they addressed the EP in January 2010¹⁸⁵.

However, the role of the Spanish presidency has to be taken with a pinch of salt, given that it worked in a very different climate from that enjoyed by the Swedish presidency. Certainly, it could have tried to improve its performance by relying more on the Commission's briefings so as to appear better prepared¹⁸⁶, but, at the same time, the Spanish presidency had less room for manoeuvre than the Swedish presidency. On the one hand, the Agreement had been signed and could not be modified. The presidency could not offer more concessions to the EP on the interim agreement. On the other hand, it faced an EP that was much less receptive than it had been during the previous months. The rapporteur lost some control over negotiations because EP political leaders took the matter into their own hands. For instance, Buzek and Guy Verhofstadt (leader of the ALDE group and Belgian MEP) asked the presidency to postpone the provisional application of the agreement, but the wish was dismissed (Euractiv 2010a). Verhofstadt – as leader of the liberal group – also put pressure on the rapporteur, Jeannine Hennis-Plasschaert, and asked her to be more assertive when talking to the presidency¹⁸⁷.

All these problems combined led to a difficult LIBE vote on 4 February 2010. The Committee voted a report that recommended the rejection of the Agreement. The decision was close – with 29 approving the committee report, 23 against, and 1 abstaining (European Parliament 2010b). The reasons behind such close vote in committee originated in the success of the EPP to present a united front in their support of the Agreement and in the pressure that the LIBE chairman (Spanish S&D López Aguilar) put on his colleagues¹⁸⁸. However, taking into account that the plenary usually follows the example set by committee, the LIBE rejection set off the alarms and sparked an intense round of lobbying to push the agreement through¹⁸⁹.

After this, the US made an “unprecedented” lobbying effort towards the EP (Monar 2010c, 145). Hillary Clinton (US Secretary of State) directly called the EP President to

¹⁸⁴ Hennis-Plasschaert, interview, March 2010.

¹⁸⁵ Diplomatic source A, interview, March 2010; Commission official F, interview, July 2010.

¹⁸⁶ Commission official F, interview, July 2010.

¹⁸⁷ EU official, interview, July 2010.

¹⁸⁸ Hennis-Plasschaert, interview, March 2010.

¹⁸⁹ EPP staff, interview, March 2011.

persuade him of the importance of the Agreement (Monar 2010c, 145). She also sent a joint letter with Treasury Secretary Timothy Geithner to President Buzek on 5 February, in which they expressed a clear concern about the behaviour of the LIBE Committee (Geithner & Clinton 2010). In order to remedy what they considered were mere misconceptions, Clinton and Geithner offered an in-depth briefing on the TFTP system to the LIBE committee (Monar 2010c, 145). Finally, Treasury Under-Secretary Stuart Levey cautioned against the potential 'tragic mistake' that rejecting the Agreement might suppose for the EU – namely the conclusion of alternative bilateral agreements with specific member states (Monar 2010c, 145).

Regardless of these interventions, the EP rejected the Agreement on 11 February 2010 by 378 votes in favour to 196 against, with 31 abstentions¹⁹⁰. The magnitude of the rejection was a surprise even to those involved in negotiations. Just before the final vote, the EPP had tried to convince the other EP groups to postpone the vote and send it back to the LIBE committee for re-examination¹⁹¹. This idea received a wider support than expected, especially after Commissioner Cecilia Malmström (responsible for the new Home DG) confirmed that she could have a new mandate for a permanent agreement by the end of February, which would allow the EP to vote on a new text by the end of March¹⁹² (Daul in European Parliament 2010a). The vote on the postponement was narrowly lost, by only 15 votes¹⁹³ of difference.

In the final vote, ALDE, Greens, radical left, and a majority of the socialists (notably, the Spanish delegation abstained) supported the rapporteur in her rejection of the Agreement. On the other side, the conservative groups were split, with the Austrians and Germans voting along national lines against the Agreement¹⁹⁴. Curiously, even some national delegations, such as the British conservatives, were split – with some members voting in support of the Agreement and others rejecting it¹⁹⁵.

¹⁹⁰ Unfortunately, no roll-call votes were recorded for this vote. The composition of the vote (below) is approximate. It has been traced back with the aid of official documents, interviews with those present during the vote as well as with press releases of the political groups and media reports (European Parliament 2010a, 194).

¹⁹¹ EU official, Busuttil, interviews, March 2010; EPP staff, interview, March 2011.

¹⁹² Diplomatic source A, interview, March 2010.

¹⁹³ 290 in favour, 305 against, 14 abstentions (European Parliament 2010b, 184).

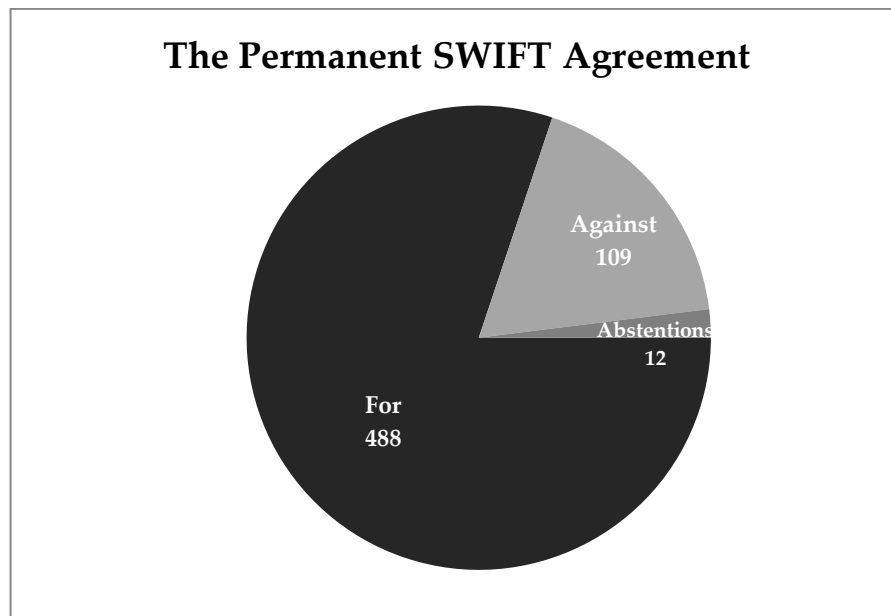
¹⁹⁴ EU official, interview, March 2010.

¹⁹⁵ Hennis-Plasschaert, interview, March 2010.

The vote on 11 February 2010 left all sides at an impasse. The weeks following the vote were spent in talks between the EU and the US, trying to ascertain whether the US would opt for *ad hoc* bilateral solutions or whether they would decide to re-open negotiations with the EU. It was not until the end of February 2010 that the latter option was accepted and the Commission started to draft a mandate, this time for a permanent agreement instead of an interim one (Euobserver 2010). On 24 March 2010, the Commission issued its recommendation – necessary to get a Council mandate – and the Council approved it on 23 April 2010, at which point the real negotiations started.

On 5 May 2010, the EP issued a new resolution, which emphasised the need to create a European equivalent to the US TFTP – an instrument eventually labelled ‘EU-TFTP’ (European Parliament 2010e). In June, the EP rapporteur (Hennis-Plasschaert) was elected as national MP in the Netherlands and thus the rapporteurship was handed to Alexander Alvaro (German MEP), also from ALDE. Shortly after, Commissioner Malmström presented a potential compromise (Euractiv 2010b), but the EP – still partially dissatisfied – allied with the Spanish presidency to clinch a new deal that modified Article 12. This article provided for the presence of an EU ‘scrutineer’ that could monitor permanently the data provided by SWIFT to the US¹⁹⁶. The Council authorised the signature of the agreement on 28 June 2010 (Council of the European Union 2010b) and, on 8 July 2010, the EP gave the green light with 484 votes in favour; 109 against; and 12 abstentions (European Parliament 2010c).

¹⁹⁶ EU official; MEP, interviews, July 2010.

Figure 7.2.: Results of Plenary Vote

Source: Adapted from Votewatch (2010a)

Figure 7.2. shows the results of the vote for a SWIFT permanent agreement at plenary level on 8 July 2010. It clearly shows that the Agreement received a wide support from the EP. Table 7.2. disaggregates the votes by political groups and national delegations inside each group.

Table 7.2.: Disaggregation of Votes (SWIFT II)

	Yes	No	Abstention
ALDE			
Cohesion: 91.18%	64	2	2
Belgium	2		
Bulgaria	5		
Denmark	3		
Estonia	3		
Finland	4		
France	4		1
Germany	9		1
Ireland	2		
Italy	2	2	
Latvia	1		
Lithuania	2		
Luxembourg	1		
Netherlands	5		
Romania	4		

Slovenia	2		
Spain	1		
Sweden	3		
UK	11		

	Yes	No	Abstention
ECR			
Cohesion: 100%	36	0	0
Czech Republic	4		
Latvia	1		
Lithuania	1		
Netherlands	1		
Poland	10		
UK	19		

	Yes	No	Abstention
EFD (Europe of Freedom and Democracy)			
Cohesion: 41.30%	14	9	0
Denmark	2		
Finland		1	
Greece	2		
Italy	8		
Lithuania	1		
Netherlands	1		
Slovakia		1	
UK		7	

	Yes	No	Abstention
EPP			
Cohesion: 94.69%	218	2	6
Austria	5		
Belgium	4		
Bulgaria	5		
Cyprus	1		
Czech Republic	2		
Denmark	1		
Estonia	1		
Finland	4		
France	25		
Germany	35	2	1
Greece	7		
Hungary	10		1
Italy	28		

Ireland	4		
Latvia	3		
Lithuania	2		1
Luxembourg	2		
Malta	2		
Netherlands	5		
Poland	24		
Portugal	8		1
Romania	11		1
Slovakia	3		1
Slovenia	2		
Spain	17		
Sweden	5		

	Yes	No	Abstention
Greens/EFA	1	45	0
Cohesion: 96.74%			
Austria		2	
Belgium		3	
Denmark		2	
Estonia	1		
Finland		2	
France		10	
Germany		11	
Greece		1	
Latvia		1	
Luxembourg		1	
Netherlands		3	
Spain		2	
Sweden		2	
UK		5	

	Yes	No	Abstention
GUE/NGL	0	30	0
Cohesion: 100%			
Cyprus		2	
Czech Republic		4	
Denmark		1	
France		5	
Germany		7	
Greece		2	
Latvia		1	
Netherlands		1	
Portugal		4	

Spain		1	
Sweden		1	
UK		1	

	Yes	No	Abstention
S&D			
Cohesion: 89.56%	147	7	4
Austria	1	3	
Belgium	5		
Bulgaria	3		
Cyprus	2		
Czech Republic	6		
Denmark	4		
Estonia	1		
Finland	2		
France	10		1
Germany	15	3	
Greece	7		
Hungary	3		
Italy	17		1
Ireland	2		
Latvia	1		
Lithuania	2		
Luxembourg		1	
Malta	3		
Netherlands	3		
Poland	7		
Portugal	7		
Romania	9		
Slovakia	3		
Slovenia	1		
Spain	17		
Sweden			2
UK	13		

	Yes	No	Abstention
NI			
Cohesion: 45.45%	8	14	0
Austria		5	
Bulgaria		1	
France		2	
Hungary		2	
Netherlands	4		
Romania	2		

Spain	1		
UK	1	4	

Source: (Votewatch 2010a)

Table 7.2. shows that the winning coalition was formed by a ‘grand coalition’ formed by the majority of liberal and socialist MEPs as well as virtually all members of the EPP and ECR. Although the permanent agreement received wide parliamentary support, its content is not significantly different from that of the interim agreement. Certainly, some points were improved, but the main areas of concern for the EP remained for the most part unchanged¹⁹⁷.

Commenting on the positive side of the new agreement, Peter Hustinx – the European Data Protection Supervisor (EDPS) – and the Article 29 Working Party¹⁹⁸ underlined that some data protection safeguards had been strengthened (European Data Protection Supervisor 2010; Kohnstamm & Pizzetti 2010). For instance, Article 2 (establishing the scope of application) provided for a more restrictive definition of terrorism. The EDPS also welcomed the omission of data from the Single Euro Payments Area (SEPA), which effectively excluded internal Eurozone financial transactions from the scope of the agreement (Article 4.2.d). Finally, both the Article 29 Working Party and the EDPS were also positive on the stricter provisions set out regarding data subjects' rights (Articles 14-18), which strengthened the right to be informed and obtain redress and simplified the right of access to (and the rectification of) one's data (European Data Protection Supervisor 2010, 3). The EDPS also welcomed the inclusion of an EU ‘scrutineer’ or overseer (Article 12) but warned that its benefits depended on how the tasks would be interpreted and implemented (European Data Protection Supervisor 2010, 13).

More importantly, as one EU official remarked¹⁹⁹, although data protection provisions had been beefed up; ultimately there had been no change in US legislation on data protection. Certainly, this was an unlikely outcome of negotiations, yet it had not stopped the EP in the past. For instance, in the resolution of September 2009, the EP had

¹⁹⁷ Diplomatic source B; Commission official G; EU official, interviews, July 2010; Sophie in ‘t Veld, communication, July 2010.

¹⁹⁸ ‘The Article 29 Working Party’ is an independent European working group dealing with matters related to personal data protection and privacy. It consists of the ‘Privacy Commissions’ of the 27 EU Member States, as well as of the European Data Protection Supervisor (Commission for the Protection of Privacy 2011).

¹⁹⁹ Interview, EU official, July 2010.

insisted on the necessity to apply the same mechanisms of judicial redress and access to justice that existed in the EU (European Parliament 2009c, points 7.d. and e.). As a result, the issues that were originally the EP's main concerns remained in the substance of the Agreement. First and foremost, the Agreement remained based on a 'bulk data' mechanism. The EP attempted to justify the absence of change with regards to 'bulk data' by rebranding the system and transforming it into a new 'twin-track' approach.

The latter supposedly "differentiates between, on the one hand, the strict safeguards to be included in the envisaged EU-US agreement, and, on the other, the fundamental longer-term policy decisions that the EU must address" (European Parliament 2010f, point 12). In practice, the strict safeguards referred to the inclusion of Europol – responsible for authorising the data transfers to the US (Article 4) – and an EU 'scrutineer', while the long-term project consisted of a vague mention to a future EU-TFTP system (Article 11). Such a system would ensure that the data would be analysed on EU territory, where the leads would be extracted and 'pushed' towards the US when requested²⁰⁰. The creation and practical implementation of such a system remain unclear.

The second major concern was the lack of any reference to a system of judicial oversight. As mentioned, the only prior control was left in the hands of Europol, which is a police cooperation agency, not a judicial authority. Apart from the doubts raised in relation to Europol's legal basis²⁰¹, Hustinx underlined a potentially more damaging concern, namely that Article 10 allows Europol to request information obtained through the TFTP for investigating terrorism. Therefore, Europol could easily be put under pressure to maintain good relations with the US in order to successfully obtain TFTP leads, compromising its effective review (European Data Protection Supervisor 2010, 10)²⁰². In effect, after the first review of Europol's function as a supervisory body, some concerns have been raised in relation to the abstract nature of the requests and the tendency to

²⁰⁰ Alvaro; EU official; Diplomatic source B, interviews, July 2010.

²⁰¹ Commission officials F and G; Diplomatic source A and B, interviews, July 2010. The interim agreement was based on the EU-US MLA agreement (see above) and received strong criticism from The Netherlands and Belgium, whose judicial systems would have had to be modified in order to make requests for 'bulk data' possible. Their system only contemplated ex-post judicial requests (on a case-by-case basis). The permanent agreement makes it possible for Europol to act as the authority responsible for authorising the searches. However, the legal basis for this new task is shaky, since it is not foreseen in Article 88 TFEU – establishing the functions of Europol.

²⁰² This concern was also raised by the GUE/NGL political advisor A, interview, March 2011.

provide information orally, making it difficult to verify the content of US requests (Europol Joint Supervisory Body 2011, 5).

In September 2009, the EP had also expressed concerns about the judicial reviews to challenge the legality and proportionality of the transfers. The new agreement mentioned in its referrals that EU nationals would receive non-discriminatory treatment when seeking administrative or judicial redress. However, the TFTP agreement remained an executive agreement and therefore it was not covered by the US Privacy Act²⁰³. As a result, potential victims would not benefit from any kind of judicial review in the US (EDRI 2010).

In summary, although the new agreement enhanced some data protection provisions and restricted its scope, the main concerns raised by the EP in its previous reports were not substantially addressed. The EP managed to insert an EU overseer and a reference to a future EU-TFTP, but the success of both measures depends on how effective their implementation would be. In view of this relatively limited change in the content of the Agreement, it is important to find explanations as to why the EP effectuated such a significant U-turn in its policy preferences. The next section exposes rationalist and constructivist explanations for the change in the position of the EP.

7.3. Constructing coalitions or acting 'responsibly'?

This section takes stock of the previous account of the SWIFT Agreement and uses it as a base to compare rationalist and constructivist understandings of the change in the EP's policy preferences. These explanations are based on the expected patterns of behaviour under the consent procedure described at the beginning of this chapter as well as on the models developed in Chapter four. The empirical analysis attempts to examine the explanatory capacity of the models when they are used to analyse the patterns of behaviour of another procedure. This exercise raises unexpected synergies that have to be accounted for, either by refining the models of co-decision or re-examining the expected patterns of behaviour under the consent procedure.

²⁰³ EU official A, communication, March 2010.

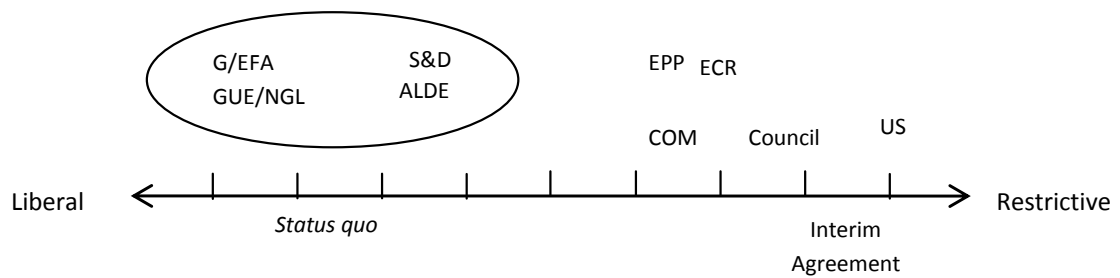
7.3.1. *Rationalism: from a principled opposition to successful coalitions*

The model developed in Chapter four can be adapted to the patterns of behaviour under the consent procedure. The rationalist model focuses on the actions of individuals, which are guided by a rational evaluation of future consequences. Their preferences are formed outside the EU institutions (e.g. at the domestic level) and, therefore, remain stable at EU level. As a result, actors are more interested in maximising their individual policy preferences than in pursuing a collective institutional gain. In this sense, institutions constrain the behaviour and options of individuals but do not influence their values or ideas. In the case of the consent procedure, the formal rules of behaviour allow MEPs to calculate the costs of accepting or rejecting an international agreement. Therefore, if a majority of MEPs considers that the cost of rejecting the agreement is too high (as it was the case for all Accession Treaties), they will prefer to accept an imperfect agreement rather than rejecting it. If, on the other hand, the cost of rejecting the agreement is lower than the *status quo*, MEPs will bargain to find the majority required to vote down the agreement.

In this sense, the key difference in the application of the model to the consent procedure is the calculation of cost and benefits. The co-decision procedure allows for more opportunities to maximise preferences (namely, via three different readings). The consent procedure, on the other hand, only allows for a calculation of cost and benefits in relation to the *status quo*: is the proposed agreement better or worse than the *status quo* (i.e. not having the agreement)? Therefore, the model needs to answer two questions regarding the SWIFT agreement. First, why did the EP reject the agreement in February 2010; second, why did it accept a similar text in July 2010?

In order to examine the costs and benefits of SWIFT for the EP, it is important to understand where the *status quo* was situated.

**Figure 7.3.: Distributional Line – Preferences on the interim ‘SWIFT’ Agreement
(Plenary)**



Source: Author's own estimations

Abbreviations:

EPP: European People's Party (Christian-Democrats)

ALDE: Alliance of Liberals and Democrats for Europe (liberals)

S&D: Socialists and Democrats (socialists)

G/EFA: Greens-European Free Alliance (green/regionalist)

GUE/NGL: European United Left-Nordic Green Left (radical left)

ECR: European Conservatives and Reformists (conservatives)

COM: European Commission

US: United States

Figure 7.3. illustrates the positions of the main actors before the vote of February 2010. Once more, the positions have been estimated from official texts, interviews and media reports and do not seek to measure the exact preferences of the actors. They are just a descriptive tool to help readers visualise the situation at the moment of the plenary votes. The dark circle contains those EP political groups that formed the winning coalition. The *status quo* is situated near this left-wing coalition. Even if, at first sight, it might seem that the *status quo* reflect the content of the agreement signed on 30 November 2009, the EP's actual decision was between that version of the Agreement or no agreement at all. Under the consent procedure, the Council could present the EP with a 'take-it-or-leave-it' situation: it either had to accept the agreement signed by member states or they would end up with no text. Therefore, the EP had to calculate the costs of having no agreement and compare them to the benefits that the text agreed in Council would bring (Garrett 1995, 300). With the information that the EP had, a rejection could lead to two different scenarios:

either the US could try to sign bilateral agreements with key member states (in particular with the Netherlands – hosting the server – and Belgium – hosting the company) or they could opt for having no SWIFT Agreement and make use of the existing MLA Agreements to request information from specific member states.

The first option was clearly not to the liking of the US administration because it would mean that information on specific offences would only be granted by a judicial authority from Belgium or the Netherlands; this undermined the whole idea of a TFTP system, based on ‘bulk data’ and ex-ante investigations. The second option was a more credible threat but the US knew it would be costly and it would take too long to be an effective alternative. After all, the MLA Agreement had taken seven years to enter into force due to a slow ratification process. Even if there was a general reluctance towards harming transatlantic relations²⁰⁴, the costs were perceived as relatively low.

In this sense, the position of the US was clear: they wanted an agreement at all costs, but the agreement had to include their core red lines: ‘bulk data’ and a request system that excluded judicial authorities, because that would have ‘judicialised’ or even ‘criminalised’ the data used in TFTP, which would have created a legal problem in the US. In fact, the US made reference to domestic issues on two occasions, both coinciding with the red lines of the EP. The first referred to the lack of judicial authorisation of the data transferred to the US. The TFTP agreement is based on a presidential order given for economic reasons, criminalising it would have forced the US to change their domestic legal basis for the TFTP system²⁰⁵. Similarly, the US also appealed to the difficulty of changing their system back at home to reject the inclusion of a system of judicial review. The US administration claimed that changing the domestic system of administrative review to one of judicial review would require an act of Congress²⁰⁶, which might prove impossible to obtain. In this sense, the US refused to move its core red lines and tried to bring the EU side as close as possible to its preferences.

As for the Council, although its position was not unanimous, the Agreement was broadly supported among member states. Most of them saw it as an effective way to outsource their own security and thus it was seen as generally beneficial for European

²⁰⁴ EU official, interview, March 2010.

²⁰⁵ EP official A, communication, March 2010.

²⁰⁶ EU official, interview, March 2010.

security (Occhipinti 2010, 137) ²⁰⁷. Besides, the Council was even more reluctant to create a clash with the US²⁰⁸. However, negotiations were not easy inside the Council, since, traditionally, the Council houses different conceptions of proportionality – with countries such as Spain or the UK tilting the balance towards countering terrorism; some, such as France or Finland, trying to find a difficult compromise and, finally, some member states prioritising data protection due to specific cultural experiences²⁰⁹. The latter – namely Germany, Austria, Hungary, and Greece – had important misgivings on the use of SWIFT data due to their past history and national data protection legislation²¹⁰ (Monar 2010c, 146). However, even these member states (at least their interior ministries) saw the use of SWIFT data as beneficial to the security of their citizens – a reason why they ultimately did not block the agreement in the Council (Focus 2010).

These internal struggles are essential to understand why, for instance, the duration of the interim agreement was reduced from two years to nine months. It was the only chance to convince Germany and Austria to accept the proposed agreement at COREPER (Committee of Permanent Representatives)²¹¹. In the end, these member states opted for a ‘constructive abstention’ in Council but then used the EP as a lobby venue to change the direction of the agreement²¹². Some sources also mentioned how the efforts of these member states were supported by a personal campaign of Justice Commissioner Viviane Reding, who was not satisfied with the content of the Agreement²¹³. She tried to lobby German and Austrian MEPs in order to make them vote against the agreement and also had meetings with EP group leaders.

This personal campaign from Viviane Reding has to be understood in the specific context of January 2010. Her aim was, essentially, an attempt to strengthen her position in the long term²¹⁴. Her eagerness boiled down to timing: the new Barroso Commission had just taken office; the old JLS DG (Justice, Liberty, Security) had been divided into two DGs, and the new Home DG (responsible for SWIFT) was headed by a former (Swedish) MEP

²⁰⁷ Commission official E, interview, March 2010; Commission official G, interview, July 2010

²⁰⁸ EU official, interview, July 2010.

²⁰⁹ Diplomatic source B, interview, July 2010.

²¹⁰ EU official, interview, March 2010.

²¹¹ Ibid.

²¹² EP official A, communication, March 2010.

²¹³ Diplomatic source A, interview, March 2010; Commission official F, interview, July 2010.

²¹⁴ Diplomatic source A, interview, March 2010.

Cecilia Malmström. Moreover, MEPs were annoyed with the Commission for not transmitting the official agreement quickly enough – leaving them only a few days to examine it. Therefore, she was afraid of losing the EP on two flanks: either because they were irritated with the subservient attitude of the Commission – which seemed to give them more reasons to grind their axe – or because they might be more sympathetic to the ideas and proposals coming from a former colleague.

In general, the position of the Commission was not particularly clear. This was due to various reasons. First, the new cabinet was still in the process of formation and therefore was not very active. Second, negotiations had been led by the Council; therefore, the Commission had not been in a position to steer the process. Finally, the Commission was, in general, quite sympathetic to the position of the Council, since it shared the same concerns about European security. In consequence, it saw SWIFT as an opportunity to outsource European security and stop a potential terror attack on its soil²¹⁵. However, being more open to data protection concerns, it took these issues more to heart than the Council (Occhipinti 2010, 137).

In a certain way, the situation in the EP was not different from that in the Commission. The EP political groups were distributed along the entire policy dimension. On the one hand, the right side of the spectrum – mainly the EPP and ECR – were not disinclined towards signing an agreement with the US on counter-terrorism²¹⁶. Although they considered that some issues could be improved, they sought assurances from the US and were satisfied with the explanations received in return (Kirkhope 2010)²¹⁷. These groups also tried to promote a more pragmatic approach and asked for the postponement of the vote, believing it would give the EP more chances to modify the content (Daul and Kirkhope in European Parliament 2010a). Furthermore, they expressed more clear concerns about what a rejection could do to future transatlantic relations, especially in such sensitive topics as counter-terrorism (Kirkhope 2010).

This position clearly differed from the principled opposition of the left-wing groups. Greens and radical left not only had very different views on the impact of SWIFT on data protection but their arguments were also based on completely divergent views of

²¹⁵ EP official A, communication, March 2010.

²¹⁶ EPP staff, interview, March 2011.

²¹⁷ Busuttil, interview, March 2010.

security and counter-terrorism²¹⁸. For instance, Jan-Philipp Albrecht (German Green MEP) declared that with the rejection

“The EU Parliament has taken a stand to strengthen the rights of 500 million people in the EU. Data protection and citizens’ rights are not an obstacle to fighting terrorism, but a bastion of the society we are trying to protect. Compromising on the most fundamental of rights devalues democracy instead of defending it. The Greens are ready to help shape a security policy that counters the threat of criminal or terrorist activity, while respecting fundamental rights” (Albrecht in Greens/EFA 2010a).

Lothar Bisky (German MEP speaking on behalf of the GUE/NGL group) went even further by affirming that “it is fundamentally wrong for alleged terrorism investigators to have such extensive access to databases, because this undermines people’s self-determination over their own personal data” (Bisky in European Parliament 2010a). In fact, most delegations of the radical left were opposed to any transfer of data to law enforcement authorities in general and, more specifically, they were opposed to ‘bulk data’ transfers. They also wanted to limit the scope of US requests to make them as narrow as possible²¹⁹. Therefore, it is clear that there was a big distance between the policy preferences of the right and the left side of the political spectrum.

However, the Greens and radical left would have been unable to oppose the Agreement without the support of some of the larger groups. Therefore, it was essential to convince the socialists and liberals to vote against the agreement. Both groups were more ambiguous towards the purpose of the agreement. Contrary to the Greens and the radical left, both groups hosted delegations or individual MEPs that held a more moderate view towards counter-terrorism. For instance, the socialist coordinator in LIBE (Claude Moraes, British MEP) emphasised that “the Socialists and Democrats, want to fight for the European citizens and we want to fight against terrorism” (Moraes in European Parliament 2010a). The socialist group was mostly concerned about data protection legislation in the US. In plenary, Martin Schulz (German MEP and S&D group leader) questioned the use of personal data by US authorities with the following arguments:

“The possibility of transferring large volumes of data without specifications and without specific details in individual cases is in fundamental conflict with the data protection legislation that we have adopted in Europe. (...) How long will the data be stored? Who is storing

²¹⁸ Albrecht, interview, March 2010.

²¹⁹ GUE/NGL political advisor A, interview, March 2011.

it? Who is passing it on to whom? What options do I have for finding out about what is happening with my data, who is accessing it and whether it is correct? What legal protection do I have to ensure that incorrect data cannot be gathered about me and passed to third parties, whoever they may be? When will my data be deleted, if it has been collected and stored? Under the terms of the Homeland Security Act, data can be stored for up to 90 years. If this includes a guarantee that I will reach the age of 90, then I'm happy to discuss it. It is worth repeating that this data can be stored for up to 90 years! All of these factors represent serious failings in this agreement" (Schulz in European Parliament 2010c).

The position of ALDE was similar, especially because the rapporteur (Hennis-Plasschaert) was member of a national party with a more restrictive stance on terrorism (Dutch People's Party for Freedom and Democracy [VVD]). Therefore, although she was unyielding in her opposition to the agreement, Hennis-Plasschaert tried to maintain a more conciliatory understanding of the necessity of having an agreement regulating the transfer of SWIFT data. On several occasions, she underlined her attachment to the fight against terrorism and also to transatlantic relations (Hennis-Plasschaert 2010; European Parliament 2010a)²²⁰. However, the conflicts between data protection standards in the agreement and European data protection legislation (which they considered undermined the European rule of law²²¹), swung the liberals into joining a left-wing coalition that made the rejection possible. The presence of the liberals in the coalition increased the size of the majority in plenary, which left the EP in a particularly strong position for further negotiations²²².

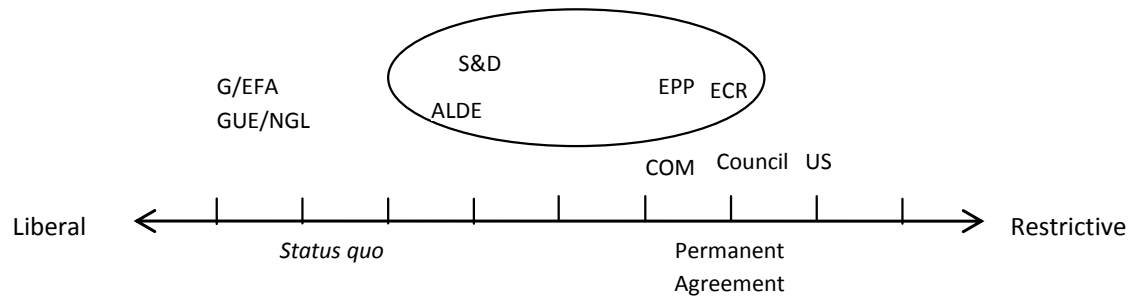
In consequence, the overriding concerns about data protection and the relatively low 'sensitivity to failure' allowed a left-wing coalition to make use of its 'nuclear' veto power to block the Agreement. In addition, the nature of the consent procedure led them to consider the rejection as a one-shot negotiation, with no consequences for future dossiers. As a result, the groups that formed the left-wing winning coalition considered that the cost of having an agreement was higher than reverting to the *status quo*. However, given the importance given to policy preferences during the February vote on the SWIFT interim agreement, how can we explain the radical change of preferences five months later?

²²⁰ Hennis-Plasschaert, interview, March 2010.

²²¹ Ibid.

²²² EU official; Hennis-Plasschaert interviews, March 2010.

**Figure 7.4.: Distributional Line – Preferences on the permanent ‘SWIFT’ Agreement
(Plenary)**



Source: Author's own estimations

Figure 7.4. shows the position of the different EP groups in the July vote. The *status quo* remained the same but the permanent agreement was now closer to the position of the EP. The Council and the Commission also moved towards the EP, while the latter created a new winning 'grand coalition' that regrouped the former antagonists (inside the black circle). It is important to analyse the position of each actor to understand their reasons for accepting or rejecting the permanent agreement.

The US had clear preferences for a permanent agreement, even if it had to be slightly modified in order to accommodate the EP. As seen above, the US clearly preferred to have one agreement with the EU as a whole rather than having to find bilateral solutions – as they threatened to do after the rejection²²³ (Monar 2010c, 145). The permanent agreement was thus a strategy of 'one-stop shopping' that would spare them the time and effort required in dealing with 27 different member states (Occhipinti 2010, 138). Second, the US aimed to have a permanent agreement as soon as possible, ideally around June. Since SWIFT only stored data for four months, the rejection would leave a gap in their security system; therefore, the quicker the agreement, the smaller the amounts of data that would be missing from the TFTP system²²⁴. Finally, the changes made to the agreement were ancillary to the US red lines. It did not force them to change their legislation and it did not put the core of the system ('bulk data') into question. Therefore, for the US, the harm was minimal.

²²³ MEP, interview, July 2010.

²²⁴ Commission official E; Diplomatic source A, interviews, March 2010.

The Commission and the Council also wanted to get an agreement; the cost of the *status quo* was perceived to be too great and thus they pushed as hard as they could to achieve a compromise. In the case of the Commission, since SWIFT was the first international agreement in this area, it wanted to make sure that it could play its role successfully. After the rejection, there were some doubts about whether the Council or the Commission should lead negotiations²²⁵; therefore, the Commission had to deliver a compromise for the Council in order to 'lock in' its role as main negotiator²²⁶. In addition, after the doubts expressed by Reding before the February vote, Malmström needed to put on a united front as well as demonstrate her capacity to lead such a sensitive dossier. With the shadow of Reding hanging over her²²⁷, she had a personal interest in seeing the agreement passed in Parliament²²⁸.

The Council was in a similar position. Member states were concerned about making the US wait; no-one was sure about how patient the US administration would be; therefore, they also had a particular interest in having the deal wrapped up as quickly as possible²²⁹. The Spanish presidency was especially determined to make a success of SWIFT²³⁰. First of all, they wanted to change the widespread perception that they had not dealt well with the February vote²³¹. Second, the Spanish Interior Minister (Rubalcaba) attached a special significance to the agreement, since its goal was to fight terrorism, an especially sensitive issue for Spain²³². Consequently, it increased coordination with the Commission and used its briefings to be better prepared during LIBE hearings²³³.

However, the difficulty for both the Commission and the Spanish presidency resided in deciding how much to concede in order to convince both the EP and a group of reluctant member states that were threatening to form a blocking minority in Council. After the rejection, there was the perception that the interim agreement was already a good deal for both EU and US interests; therefore, it was not easy to change it without compromising

²²⁵ Commission official E, interview, March 2010; Commission official F, interview, July 2010.

²²⁶ Commission official G, interview, July 2010.

²²⁷ Diplomatic source A, interview, July 2010.

²²⁸ EU official, interview, July 2010.

²²⁹ Diplomatic source A, interview, March 2010.

²³⁰ S&D political advisor, interview, March 2011.

²³¹ Commission official F, interview, July 2010.

²³² Diplomatic source A; EU official, interviews, July 2010.

²³³ Commission official F; EU official, interviews, July 2010.

the red lines of the US²³⁴. In the end, the solution was to modify the legal basis of the agreement and offer a role to Europol. This appeased some reluctant member states, such as the Netherlands, Belgium, Germany or the UK²³⁵.

It also proved a key concession for the EP, since it was an opportunity to present the permanent agreement as a new ‘twin-track’ approach²³⁶ – namely giving some control over data transferred to the US, while proposing a future EU TFTP system. This new approach changed the cost/benefit calculation of some groups, which led them to change their opinion and vote in favour of the permanent agreement²³⁷. In the case of the EPP and the ECR, the ‘twin-track’ approach reduced the costs of the interim agreement while keeping its benefits: it included some further assurances and offered the potential to advance in the fight against terrorism at EU level²³⁸. For instance, the EPP declared that they

“firmly support this new Agreement following the changes introduced in order to guarantee higher standards of data protection, including a thorough European oversight of data extraction on US soil. Negotiations were reopened to take Parliament's final demands into account, such as the request for a binding twin-track approach to establish a European Terrorist Finance Tracking Programme (TFTP) at the earliest” (European People’s Party 2010).

In the opinion of the EPP, the introduction of a ‘twin-tack’ approach “left them with no arguments to vote against the Agreement”²³⁹. Equally, they managed to convince the more “reasonable forces” among the socialists and liberals that the changes were sufficient to change their opinion and support the EPP²⁴⁰. The S&D group also used this new approach to explain the change in its preferences. For instance, Claude Moraes (British MEP and LIBE coordinator) declared that

“On the central point, the transfer of bulk data of EU citizens, we have successfully brokered the so-called twin-track approach, combining strict safeguards, such as the EU appointment of EU staff in the US Treasury, with a concrete timetable leading the way to a European

²³⁴ Diplomatic source A, interview, March 2010.

²³⁵ Diplomatic source A and B; Commission official F; EU official, interviews, July 2010.

²³⁶ In ‘t Veld, communication, July 2010.

²³⁷ GUE/NGL political advisor A, interview, March 2011.

²³⁸ EPP staff, interview, March 2011.

²³⁹ Ibid.

²⁴⁰ Ibid.

solution for the extraction of data on EU soil" (Moraes in European Parliament 2010b).

ALDE emphasised that "Parliament has stood up for citizens' rights to privacy by insisting that the current transfer of bulk data via Swift will be replaced by a properly controlled European data transfer system" (ALDE Group 2010). In consequence, socialists and liberals – who had been at the core of the winning coalition in February – also considered this new approach as a solution to the necessity of transferring 'bulk data' to the US. This new element of the permanent agreement reduced one of the major costs of the interim agreement, which rendered the benefits of a reversion to the *status quo* less attractive.

However, as seen above, the 'twin-track' solution could prove to be an ineffective alternative, since it is not clear how and when an EU-TFTP will be developed. This means that the justifications provided for the U-turn rested on weak bases. In fact, this alternative was not convincing for the more left-wing groups, who stood to their former positions and argued the role should be given to the EDPS or the Article 29 Working Party instead²⁴¹. The Greens – more involved in negotiations than the radical left – accepted the fact that they would be in a minority²⁴² but considered that the idea of a 'twin-track' approach did not actually reduce the cost of the agreement. After the vote they declared that

"The adoption of the new swift agreement by the majority of the parliament is a blow for the negotiations on a binding protection of fundamental rights in international security cooperation. There were some improvements to the first draft, but there is still fundamental criticism of the massive data transfers without initial suspicion and the too long data retention periods. The grand coalition of conservatives, social democrats and liberals has therefore accepted lower standards than the existing principles of the rule of law and is risking a regulation that is in breach of EU law" (Greens/EFA 2010b).

Despite numerous efforts to convince the other groups that the calculations of costs and benefits had not substantially changed, once liberals and socialists had decided to support the new Agreement, there was not much that the Greens could do to block it²⁴³. The radical left was similarly unhappy about the agreement²⁴⁴ but, in comparison, it tried to use its limited bargaining strength by trying to delay the vote in LIBE. Rui Tavares

²⁴¹ GUE/NGL political advisor A, interview, March 2011.

²⁴² Alvaro, interview, July 2010.

²⁴³ Sidenius, interview, March 2011.

²⁴⁴ GUE/NGL political advisor A, interview, March 2011.

(Portuguese GUE/NGL MEP) asked for the opinion of the EP's legal service, but his request was dismissed²⁴⁵. He also tried to ensure that the EP would be involved in the nomination of the new EU 'scrutineer'²⁴⁶ (Tavares in European Parliament 2010b), because he was probably concerned that the person chosen by the Commission would be biased towards US views²⁴⁷; however, these attempts to block or delay negotiations proved unsuccessful. Therefore, the opposition of the Greens and the radical left shows that the re-calculation of costs and benefits as a result of the introduction of a 'twin-track' solution led to radically different positions and patterns of behaviour.

The contrasting calculation of cost and benefits is puzzling, since liberals, socialists, Greens, and the radical left were in the same winning coalition during the February vote. How to explain that half of the groups in the coalition considered that the costs of the permanent agreement were still too high, while the other half was satisfied with it? It is certainly difficult to explain the behaviour of the socialists and liberals in rational terms; one can understand individual behaviours (of specific MEPs) but not the strategy of the political group as a whole. For instance, the position of the S&D leaders could be understood as individual strategies to satisfy their own preferences. Some have noted that Martin Schulz changed tack and supported the agreement in order to attract media attention²⁴⁸ and keep a high profile²⁴⁹. In the same way, Juan Antonio López Aguilar (LIBE chairman) wanted to support his own national political party, in charge of the presidency; therefore, he obstructed negotiations in LIBE²⁵⁰ and sent the dossier up for the plenary vote without consulting the rapporteur²⁵¹. Given that there were several contradictory voices speaking for the S&D, it seems that these individual preferences weighted heavily on the group when it had to decide whether or not to support the permanent agreement²⁵².

Similarly, one can explain the steps taken by Alvaro as an ALDE rapporteur. After the decision of the S&D to join the EPP and ECR in their support for the Agreement, Alvaro was afraid of being left behind. Perhaps recalling the events of the 'Data retention' directive

²⁴⁵ Diplomatic source A; Alvaro, interviews, July 2010.

²⁴⁶ Diplomatic source B; EU official, interviews, July 2010.

²⁴⁷ GUE/NGL political advisor A, interview, March 2011.

²⁴⁸ Diplomatic source B, interview, July 2010.

²⁴⁹ Alvaro, interview, July 2010.

²⁵⁰ Sidenius, interview, March 2011.

²⁵¹ Alvaro, interview, July 2010.

²⁵² Ibid.

(see Chapter five), he wanted to make sure that the winning coalition would include the liberal group²⁵³. Moreover, he probably wanted to see such a controversial file voted through as a question of personal prestige²⁵⁴. Some have argued that his insistence on including a mention of a future EU-TFTP at the last hour reflected a desire to put his stamp on the agreement²⁵⁵.

In conclusion, although one can find specific explanations for some individual decisions by members of the key political groups (mostly related to their higher 'sensitivity to failure'), it is difficult to understand why the majority of MEPs in those groups accepted a solution that did not address the core of the EP's concerns. Although some new elements (such as a future EU-TFTP and some increased controls on the data) were seen to reduce the costs of the agreement, the main reasons for the rejection were not substantially addressed. The permanent agreement was still based on 'bulk data'; it did not foresee any sort of judicial authorisation or judicial review; and it did not force the US to improve its data protection legislation.

The re-negotiation of the agreement also shows that, although the agreement was still more favourable towards the US and the Council, everything was done to include the EP. This clearly broke the patterns expected under the consent procedure, where the EP should only respond to a ready-made text signed by the Council. The behaviour of the other actors (Council, Commission and US) can be explained due to their higher 'sensitivity to failure'. The shadow of the EP's veto power increased their fear of another rejection and led them to offer some concessions to the EP that would secure its consent. However, this justification for their behaviour underlines the lack of rational explanation behind the behaviour of socialists and liberals. Apart from specific individuals, these two groups (as a whole) could still have used the EP's veto powers to obtain more concessions. Why consider that a 'twin-track' approach was sufficient, even if it did not address its main concerns and did not change US legislation on data protection? A constructivist explanation to the changes occurred during the period of re-negotiation can help fill the gaps left by rationalist explanations.

²⁵³ Ibid.

²⁵⁴ GUE/NGL political advisor A, interview, March 2011.

²⁵⁵ EU official, interview, July 2010.

7.3.2. *Constructivism: from 'nuclear' power to consensual behaviour*

In the aftermath of the February vote, Martin Schulz justified the rejection of the interim agreement on the following grounds:

“The US Administration may have wrongly thought they could deal with the European Parliament like Gulliver with the Lilliputians. Under the Swedish Presidency, European governments and the Council also made a mistake to believe it would be possible to force the European Parliament to give its consent on an unacceptable agreement based more on the US approach to security than on the EU's defence of citizens' fundamental rights” (Schulz in Euractiv 2010b).

His justification showed that the rejection was not just about data protection issues but that it touched upon more sensitive ground than what a rationalist explanation would propose. In consequence, the constructivist explanation looks beyond rational calculations attempting to maximise the policy preferences of the EP and focuses on the interaction between data protection issues and a larger discourse on institutional power.

As explained above, the SWIFT Agreement was politically loaded since the very beginning. The new negotiations re-opened old wounds, both in terms of policy issues and institutional confrontations. SWIFT was not the first case of conflict between the EP and the Council on agreements with the US related to data protection. It reminded of discussions around the shape and content of PNR and Safe Harbour (European Parliament 2000, 2006, 2007c, 2008b). These different agreements with the US had antagonised the EP due to their low levels of data protection but also because, in all cases, the Council had consistently dismissed the views of the EP. In consequence, the political load hanging over the SWIFT Agreement was both policy and institutionally motivated. In fact, the two aspects fed into each other: increasing the voice of the EP was coherent with improving the levels of data protection.

The mobilisation of this discourse started with the EP's resolution of September 2009. The resolution underlined the necessity to involve the EP in both ongoing (point 13) and future (points 7.h. and 7.i.) negotiations. However, the EP quickly came to the conclusion that it was not being listened to. For instance, the rapporteur noted how, although the resolution received a broad support from all EP political groups, the Council did not take the EP's position seriously enough. Although it listened to the EP, it did not

realise that the EP would stick to its positions, i.e. it would not accept just any text that the Council happened to put in front of the EP for ratification²⁵⁶.

This impression was certainly increased by the vote on 30 November 2009. Although, in practice, the vote might not have made a radical difference to the level of parliamentary involvement, the gesture was perceived as an affront to the new powers granted to the EP by the new Treaty of Lisbon²⁵⁷. The Swedish refusal to accept the postponement of the vote – requested by President Buzek some days earlier – transformed the issue into a matter of honour and respect²⁵⁸. Some MEPs considered that, after the signature of the Agreement, “the EP felt ignored and overrun with contempt”²⁵⁹; “it looked as if the Council was saying that it did not care about the EP”²⁶⁰.

Therefore, the bad timing of the Council only served to feed a much larger discontent, especially since, for some years, the EP had not been happy with international agreements in the third pillar²⁶¹. This increasing feeling of disrespect built into a narrative that resonated with the long-standing confrontation between Council and Parliament, which made it easier to accept²⁶². This narrative was supported by external actors, who amplified the legitimacy of the discourse. For instance, the role of the German government – who had only reluctantly accepted the signature of the Agreement – proved essential to reinforce this growing rationale. The behaviour of the German government was partly due to domestic conflicts between the coalition partners; while the German Minister of Justice (Sabine Leutheusser-Schnarrenberger, member of the liberal Free Democratic Party [FDP]) firmly opposed SWIFT, the German Minister of Interior (Thomas de Maizière, member of the Christian Democratic Union [CDU]) welcomed the agreement and even pushed for more restrictive measures²⁶³. Therefore, the beginnings of a fully-fledged inter-institutional battle offered an opportunity to the FDP to lobby German MEPs in order to change the direction of the vote²⁶⁴. As explained above, it seems that these efforts were supported by

²⁵⁶ Hennis-Plasschaert, interview, March 2010; Sidenius, interview, March 2011.

²⁵⁷ Commission official E, interview, March 2010; EPP staff; S&D political advisor; ALDE political advisor B, interviews, March 2011.

²⁵⁸ Diplomatic source A, interview, March 2010.

²⁵⁹ MEP, interview, July 2010.

²⁶⁰ Busuttil, interview, March 2010.

²⁶¹ Commission official E, interview, March 2010; S&D political advisor, interview, March 2011.

²⁶² Commission official G, interview, July 2010.

²⁶³ Commission official E, interview, March 2010.

²⁶⁴ EU official, interview, March 2010.

the personal campaign of Viviane Reding. Although her campaign pursued very personal goals, her actions made the stakes of the agreement more salient and – as a result – it clearly expanded the inter-institutional conflict.

Her actions were received by an enthusiastic audience in the EP, since it was clear that some key groups – especially the liberals – had already “chosen to flex their muscles and show strength”²⁶⁵. For instance, it seems that Verhofstadt (leader of the ALDE group) was especially keen to reaffirm the institutional powers of the EP after the entry into force of the Treaty of Lisbon²⁶⁶. Consequently, it is not a surprise that all the efforts made by the presidency and the US to redress negotiations backfired and increased the feeling of rejection and contempt felt by the EP since November 2009. The constant efforts of the Council and the US only had the effect of making the EP feel like a “*quasi-parliament*”²⁶⁷. In LIBE, members felt especially pressured by the Presidency. They not only considered that the Spanish ministers had held an arrogant position²⁶⁸ (for instance, refusing to offer in plenary the assurances they he had promised to give to the EP one day earlier²⁶⁹), but they were also wary of the LIBE chairman. As mentioned earlier, López Aguilar’s allegiances were split between his role as committee chair and member of the party holding the presidency and, as a consequence, some resented that he sided with his national political party rather than representing the view of the majority in the committee²⁷⁰. After the LIBE vote, although the letter sent by Clinton to Buzek impressed some MEPs²⁷¹, it failed to turn the situation around.

Before the votes, MEPs were faced with a confusing series of events. MEPs had to vote, first, for or against the postponement of the vote. This option being rejected, they had then to decide whether to support the recommendation of the rapporteur to reject the agreement. At that point, the discourse around data protection fused with the institutional narrative for respect and more powers. EP political leaders used it effectively to convince those MEPs that were still unsure about how to vote. It also swayed those MEPs that were

²⁶⁵ EU official, interview, March 2010.

²⁶⁶ Ibid.; EP official A, communication, March 2010.

²⁶⁷ EP official A, communication, March 2010.

²⁶⁸ Diplomatic source A, interview, March 2010.

²⁶⁹ Hennis-Plasschaert, interview, March 2010; ALDE political advisor B, interview, March 2011.

²⁷⁰ Hennis-Plasschaert, interview, March 2010; Alvaro, interview, July 2010; Sidenius, interview, March 2011.

²⁷¹ Hennis-Plasschaert, interview, March 2010.

simply less aware of the implications of the agreement²⁷². For instance, EP President Buzek clearly brought together the policy and institutional aspects of the rejection by declaring that:

“In what we are doing, there is also another important element: the European Parliament has become jointly responsible for European legislation. We are also responsible for international agreements, such as the SWIFT agreement, and we are giving a strong signal that the situation has changed, now that the Treaty of Lisbon is in force. This is important. I think the recent signals from the American Government show that it has become clear that the European Parliament is, today, *fully responsible for legislation*. We wanted it to be a strong signal. However, we know *we are responsible to our citizens*. We are directly elected Members of the European Parliament. *Our responsibility to defend citizens’ rights* is of fundamental significance and we always stress this” (President in European Parliament 2010c, emphasis added).

In this sense, Buzek’s declaration shows how the rejection resonated with both the procedural and the substantive dimensions of ‘meta-norms’ in the AFSJ: Parliament could not only show its institutional power; it could also argue that it did so to protect EU citizens. As the rapporteur put it, a rejection just for the sake of a rejection would not have been justified; it had to affect European rights²⁷³.

In this context, some (mostly Christian-Democrats and conservatives) attempted to play the transatlantic card. They appealed to upcoming negotiations with the US such as the new PNR Agreement (Marinescu in European Parliament 2010c) and asked for moderation in order to achieve more when negotiating a permanent agreement (Kirkhope in European Parliament 2010a). This alternative discourse was very easily placated by using the same arguments that had pushed the EP towards a rejection. For instance, the rapporteur rebutted these interventions by claiming that:

“if the US Administration would propose to US Congress something equivalent to this to transfer in bulk bank data of American citizens to a foreign power we all know what the US Congress would say – don’t we?” (Hennis-Plasschaert in European Parliament 2010c).

This argument “seemed to do the trick with a lot of MEPs”²⁷⁴. Some MEPs have acknowledged that some other parliamentarians might not have been opposed to the

²⁷² Ibid.; Commission official E, interviews, March 2010; Commission official G, interview, July 2010.

²⁷³ Hennis-Plasschaert; EU official, interviews, March 2010.

²⁷⁴ Hennis-Plasschaert, interview, March 2010.

Agreement *per se*; they might have agreed to the idea of having European security outsourced to the US, especially if this avoided a major transatlantic conflict²⁷⁵. Therefore, without the powers and reputation of the EP at stake, the result might have been very different. Interestingly, in the aftermath of the vote, the issue was presented to the public as a data protection issue. MEPs were keen to emphasise the substantive dimension, which touched on citizens' rights, rather than the inter-institutional issues²⁷⁶. Yet, the re-negotiation of the agreement seems to confirm that the institutional motivations were more important than the policy preferences of the EP.

Most actors involved were unable to decide what the right move might be after the rejection. On the side of the Council and the Commission, some had the feeling that Parliament had rejected the agreement "to teach Council a lesson"²⁷⁷, namely as a payback for the treatment received from the Council before the Treaty of Lisbon. It was also seen as a warning about how the EP wanted to use its new powers²⁷⁸. In consequence, if an EU agreement with the US had to be secured, something had to be done to change the context and the roles played by each institution during negotiations. It all boiled down to re-interpreting the rules of the Treaty, in order to accommodate the wishes of the EP.

The period from March until June 2010 was dedicated to finding a new common understanding of Article 218 TFEU (which details the different steps of the consent procedure). Crucially, Article 218.10 states that "[t]he European Parliament shall be immediately and fully informed at all stages of the procedure". Before the rejection, Commission and Council had implemented this article literally: they had informed the EP at all stages, but they had not gone further than that. The EP, on the other hand, read the article as having a right to comment *and participate* in all stages of the procedure²⁷⁹. In consequence, the weeks following the rejection were essential to establish the future of the consent procedure.

The Commission – being now the institution in charge of starting negotiations – was thrown in at the deep end and was forced to provide its own interpretation of the

²⁷⁵ In 't Veld, communication, July 2010.

²⁷⁶ Busuttil, interview, March 2010.

²⁷⁷ Diplomatic source A, interview, March 2010.

²⁷⁸ EU official, interview, July 2010.

²⁷⁹ Diplomatic source A, interview; EP official A, communication, March 2010.

Treaty rules²⁸⁰. The Commission was well aware that the new mandate would have to incorporate some of the EP's requests²⁸¹. Failing to do so would be equal to pronouncing the negotiations dead from the very beginning. Therefore, Commissioners Malmström and Reding worked together to draft a new mandate that would placate the EP and start negotiations afresh. Both of them provided the EP with information²⁸² and discussed the new mandate with key MEPs²⁸³. By doing so, the Commission effectively interpreted the obligation to *inform* the EP at all stages as being equivalent to *involving* the EP from the earliest stage of the procedure²⁸⁴.

In order to take effect and gain legitimacy, this new interpretation of the rules needed to be accepted by all the actors involved in negotiations. In consequence, the reactions of the Council and the US were essential to determine whether this new interpretation would be accepted by all and thus turned into the new rules of the game. On the one hand, the US quickly became more conciliatory in its relationship with the EP and paid more attention to its interests²⁸⁵. The US invited LIBE MEPs to visit the US on several occasions in order to discuss the main issues with senior US representatives (Euractiv 2010b)²⁸⁶ such as Janet Napolitano (United States Secretary of Homeland Security)²⁸⁷. Furthermore, the US Vice-President, Joe Biden, visited the EP on 6 May 2010. It was the first visit by a US Vice-President or President since Ronald Reagan addressed the EP in 1985 upon the 40th anniversary of the end of the Second World War (European Parliament 2010j) and thus it was a clear sign of respect towards the EP.

In consequence, the efforts made by the US towards the EP had several effects. First, they gave MEPs a sense of importance that resonated with their desire to be

²⁸⁰ Diplomatic source A, interview, March 2010; Commission official G, interview, July 2010.

²⁸¹ Hennis-Plasschaert, interview, March 2010; Commission official G; Diplomatic source B; EU official, interviews, July 2010.

²⁸² Diplomatic source A, interview, March 2010.

²⁸³ Commission official E, interview, March 2010; EU official, interview, July 2010.

²⁸⁴ At the same time of the SWIFT negotiations, the EP and the Commission started talks on a revised inter-institutional agreement that solidified this interpretation of the rules. The new inter-institutional agreement underlines that "the information [on international negotiations] shall be provided to Parliament in sufficient time for it to be able to express its point of view if appropriate, and for the Commission to be able to *take Parliament's views as far as possible into account*" (European Parliament & European Commission 2010, point 19, emphasis added).

²⁸⁵ S&D political advisor, interview, March 2011.

²⁸⁶ Hennis-Plasschaert, interview, March 2010; Alvaro; EU official, interviews, July 2010.

²⁸⁷ MEP, interview, July 2010.

considered as a full-fledged parliament²⁸⁸. Secondly, it engaged the EP in negotiations from an early stage, thus reinforcing the choice made by the Commission. As a result, the EP felt included and listened to, especially when the US committed to inserting some changes in the draft agreement that assuaged some of the EP's concerns²⁸⁹. Notably, the US promised to "provide assistance and advice to contribute to the effective establishment of such a system [EU TFTP]" (Article 11.2) and to accept the appointment of an independent 'scrutineer' (Article 12). In sum, the attempts of the US to hold a direct dialogue with the EP are another sign of the re-interpretation of the rules. Although, in theory, they were supposed to negotiate only with the Commission, the US tried to tip the balance and find informal ways to enter in contact with key members of the EP in order to facilitate the conclusion of the agreement²⁹⁰.

Emphasising the change of behaviour from the US and the Commission, the EP also requested that the Council be more compliant and to accept it as a partner²⁹¹. In a sense, there was suddenly a clear contrast between the Council not engaging with the EP and the US trying to persuade MEPs and providing as much information as possible²⁹². Therefore, the Council quickly recognised that it needed to change tack if it wanted to conclude the permanent agreement before summer²⁹³. The change was especially evident in the Spanish Presidency. There is some discrepancy regarding the roles of the presidency and the Commission during this period. Some consider that, given that the Commission was in charge of negotiations, the presidency's level of involvement was minimal²⁹⁴. Others consider that it was the Commission that kept a 'conservative' role (i.e. it acted as it used to before Lisbon), forcing the EP to strike a deal directly with the US and the Spanish presidency²⁹⁵. What is certain is that the behaviour of the presidency was more accommodating than during the first months of 2010. The efforts of the Spanish presidency became especially apparent during the last stages of negotiations, when it negotiated directly with the EP and forced the Commission to renegotiate Article 12²⁹⁶.

²⁸⁸ Commission official F; MEP, interviews, July 2010.

²⁸⁹ MEP, interview, July 2010.

²⁹⁰ Commission official G, interview, July 2010.

²⁹¹ Ibid.; Alvaro, interviews, July 2010.

²⁹² Commission official G, interview; In 't Veld, communication, July 2010.

²⁹³ Alvaro, interview, July 2010.

²⁹⁴ Diplomatic source A, interview, July 2010.

²⁹⁵ S&D political advisor, interview, March 2011.

²⁹⁶ MEP; Diplomatic source A; EU official; Commission official G, interviews, July 2010.

This final intervention of the EP in negotiations meant an important overhaul in the formal procedures. During the last stages, the Commission's actions were not only guided by the Council mandate – as the Treaty foresees – but also by the EP resolution issued on 5 May 2010²⁹⁷. The EP was also able to block and steer negotiations to a greater extent than even the presidency²⁹⁸. In fact, an EU official remarked that some member states had the impression that – by letting the EP have a final say on the negotiations – the Commission had turned the procedure upside down: in this instance, it was the Council who was left only with the capacity to say 'yes' or 'no'²⁹⁹. Clearly, the first international agreement under Lisbon rules was not negotiated as expected by the Commission or the Council.

The result of these informal modifications to the consent procedure is that they transformed consent into a *quasi*-co-decision. Significantly, the impression that the consent procedure had been transformed into something similar to co-decision was shared by all those involved in negotiations. For instance, some MEPs noted that, in future, even if consent remains the formal rule to deal with international agreements, the other institutions would have to act as co-decision applied by consulting and fully involving the EP³⁰⁰; the shadow of failure coming from an EP unhappy with negotiations would be difficult to ignore³⁰¹. This shift in the procedure raised concerns among some decision-makers, especially those in the Commission, who saw their independence and role as primary negotiators threatened³⁰². However, the turn of the consent procedure into a *quasi*-co-decision has further implications that can help to explain the U-turn in the EP's policy preferences.

This change had a more profound transformative effect on the EP's patterns of behaviour than could have been foreseen. The re-negotiation of SWIFT shifted the behaviour of the EP from that of an institution with a potential 'nuclear' power to that of an institution behaving as it usually does under co-decision. In this sense, the EP adopted the patterns of behaviour typical of a co-legislator: it became more consensual; it ended up with a grand coalition; and the policy outcomes were remarkably centripetal – with only

²⁹⁷ Commission official F, interview, July 2010; GUE/NGL political advisor A, interview, March 2011.

²⁹⁸ Diplomatic source A, interview, July 2010.

²⁹⁹ EU official, interview, July 2010.

³⁰⁰ Alvaro, interview; In 't Veld, communication, July 2010.

³⁰¹ Commission official G, interview, July 2010.

³⁰² Commission official F and G; EU official, interviews, July 2010.

minor changes introduced into the core of the TFTP system. As a Commission official expressed it: before the rejection, the EP was behaving like a child at Christmas, testing how the new toys worked³⁰³. During the five months that followed the negative vote, the EP became more 'responsible' and turned consent into a procedure similar to co-decision; its patterns of behaviour became more consensual and its preferences more centripetal.

However, more 'responsibility' meant that "a 'Christmas tree' approach should be avoided"³⁰⁴ in order to make the Commission mandate firm and realistic. Therefore, the EP, who had been described "as a kind of 'institutionalized NGO' on many internal security matters" (Occhipinti 2010, 136), had to change tack and abandon some of its more outlandish demands in order to participate fully in negotiations. The weight of this new (self-imposed) 'responsibility' dawned on those in the EP closely involved in negotiations. For instance, in March 2010, the first rapporteur (Hennis-Plasschaert) had assured that, even if the US and Council were more open to dialogue, "the EP would not accept an imposition from the Council or another big hand from member states like it had happened during the 'Data retention' directive"³⁰⁵ (see Chapter five). In contrast, the second rapporteur (Alvaro) agreed that the agreement might not have been the best outcome but that, after all, "one cannot function purely on political theory or dogmas, a compromise has to be accepted and the red lines taken into account"³⁰⁶. Furthermore, although one of the reasons for accepting the agreement was to make sure that ALDE would be part of the final coalition, he justified this action as a way to gain 'responsibility' and more powers³⁰⁷. In this sense, he equated 'responsibility' with compromise – that is, being able to "explain more to citizens why one is not fundamentally against the deal"³⁰⁸. Being 'responsible' meant that their decision needed to reflect the increased effort put in this round of negotiations³⁰⁹. As seen before, the effort to be 'responsible' translated also into the necessity of the liberal group to show support for Commissioner Cecilia Malmström, a previous colleague³¹⁰.

³⁰³ Commission official F, interview, July 2010; EPP staff, interview, March 2011.

³⁰⁴ Commission official E, interview, March 2010.

³⁰⁵ Hennis-Plasschaert, interview, March 2010.

³⁰⁶ Alvaro, interview, July 2010.

³⁰⁷ Ibid.

³⁰⁸ Ibid.

³⁰⁹ Ibid.

³¹⁰ ALDE political advisor A and B, interviews, March 2011.

This perception of the new powers of the EP in international agreements was shared by other EP members. For instance, Simon Busuttil (EPP coordinator in LIBE) commented how, after the rejection, the EP had grown in stature and importance; it made now full use of its new role³¹¹. He also accepted that, in future consent cases, the EP would have to learn a lesson from SWIFT: from now on, it would have to realise that the new power had to be carried with ‘responsibility’³¹². It was important that the EP was seen as ready to accept a deal, so that it could not be accused of being ‘irresponsible’³¹³. It was this perceived sense of ‘responsibility’ and involvement in the procedure that made the final agreement possible. Both liberals and conservatives wanted to avoid a continuous opposition with the Council and the Commission; the EP had made its point with the rejection and now it was “back to business” for them³¹⁴. In this sense, the EP made some concessions and took into account the US’ red lines, and, in return, it was able to shape the new procedure and create new benchmarks for its right of consent³¹⁵.

The shift in inter-institutional powers justified the change of preferences because it resonated with procedural ‘meta-norms’. However, this came at the expense of the substantive dimension, since the content of the permanent agreement was not radically different from the interim agreement. As a GUE/NGL political advisor put it:

“during SWIFT negotiations all were talking about data protection but in the end, the socialist and conservatives agreed to introduce a supervisor in the US [Article 12] and this was enough to make it all ok.”³¹⁶

The change of discourse from the socialist group – who had been very vocal in the past – was essential to swing the vote. Once the deal was done, members of the socialist group forgot their previous qualms on data protection issues and simply accepted the need to vote in favour of the permanent agreement.³¹⁷

Three examples illustrate the importance of ‘responsibility’ and consensus in achieving a positive vote in July. First, Alvaro refused to ask the EP legal service for an opinion on the legal basis of the Agreement, although he also had doubts about the legal

³¹¹ Busuttil, interview, March 2010.

³¹² Ibid.

³¹³ GUE/NGL Political advisor A, interview, March 2011.

³¹⁴ Sidenius, interview, March 2011.

³¹⁵ Diplomatic source B; EU official, interviews, July 2010.

³¹⁶ GUE/NGL Political advisor A, interview, March 2011.

³¹⁷ Ibid.

basis and toyed with the idea of asking for the legal service's advice³¹⁸. The fact that he refused to ask for it – which would have postponed the vote – shows how ready he was to find a quick compromise. Second, Alvaro (an FDP member) used his position to convince the CDU in Germany³¹⁹. In return, the German government supported him when he tried to modify Article 12³²⁰. The strategy of dialogue and compromise paid off, because almost all of the German MEPs of those groups that ultimately formed the winning 'grand coalition' voted in favour of the compromise (Votewatch 2010a). At the same time, the German government only decided to vote in favour in the Council when it was convinced that the EP would support the Agreement³²¹. Finally, Alvaro repeatedly used the concept of 'Möglichkeit' (possibility) to produce a psychological shift among MEPs, especially among those in LIBE who were more concerned with the content of the agreement³²². This concept transmitted the ideas of compromise and institutional involvement. In plenary, Alvaro used it several times to bring his point home:

“[I]t emerged during the subsequent negotiations [after the rejection] that the word '*impossible*' was used a great deal. It was *impossible* to alter certain things, or to reopen the agreement. It was *impossible* to demand concessions from the United States, let alone for the European Parliament to have any influence over the Council. If I personally have learnt anything from this discussion, it is that the word '*impossible*' does not exist in politics if the political will is there. For we have seen that the European Parliament was in a position, in collaboration with the Commission, to ensure that improvements were inserted into the text of the agreement. (...) I believe that, with reference to the changes that the Treaty of Lisbon has set out, we have shown what form they can take, and that, together with the Commission and the Council, we have been aware of our responsibility to present a sensible solution. (...) [T]he European Parliament has provided proof of the fact that, following the Treaty of Lisbon, it is ready to work in collaboration. Mr Garrido [Diego López Garrido, Spanish Secretary of State for the EU] has stated that he had underestimated the European Parliament. I believe that he has, not only in its willingness to work together but also in its willingness to show responsibility. I believe that we have hereby opened a new era in the sphere of EU lawmaking” (Alvaro in European Parliament 2010b, emphasis added).

³¹⁸ EU official, interview, July 2010.

³¹⁹ Alvaro, interview, July 2010.

³²⁰ EU official, interview, July 2010.

³²¹ Ibid.; Alvaro, interviews, July 2010.

³²² MEP; Alvaro, interviews, July 2010.

The importance of being ‘responsible’ seems to have shifted the consent procedure in more directions than one. It is not only the Commission and the Council that are now more prepared to involve the EP in international negotiations. After the SWIFT Agreement, the EP has started to use the consent procedure with more care. For instance, in September 2010, the EP gave its consent to a *Readmission Agreement with Pakistan* (European Community 2010)³²³. Although the EP was not completely convinced about the content of this agreement, it decided to vote in favour because “one could not say no again to Council”³²⁴. Indeed, it seems that most EP actors (and especially the EPP group) consider that the EP should use the right of consent with ‘responsibility’, because the procedure is a “sharp tool”³²⁵ in its hands that should not be overused³²⁶.

This new sense given to the concept of responsibility might have an important effect on the policy outcomes of future international agreements. In the case of SWIFT, the necessity to behave ‘responsibly’ meant that the EP had to settle for an agreement with fewer changes than those desired at the beginning. As mentioned previously, the final result did not fulfil the basic claims of the EP as regards ‘bulk data’ and judicial redress in the US. The red lines of the US were ultimately respected and the EP simply inserted some provisions to justify a positive vote. Ultimately, the EP had to sacrifice its policy preferences in order to be effective in negotiations. The inter-institutional power was therefore seen as its fundamental objective and took the upper hand in front of the protection of personal data.

Conclusion

The negotiations on a SWIFT Agreement show that – in line with past occasions, such as the ‘Data retention’ directive – the EP cannot be taken any longer for granted as an unconditional advocate of data protection. The permanent agreement is certainly less restrictive than the interim agreement; however, it does not fit into the liberal image of an ‘institutionalised NGO’ portrayed by the EP under consultation and at the beginning of the consent procedure. How can we explain such a shift in the preferences of the EP? Was it

³²³ With 382 votes in favour, 250 against and 23 abstentions (European Parliament 2010e, 33).

³²⁴ Sidenius, interview, March 2011.

³²⁵ EPP staff, interview, March 2011.

³²⁶ Ibid.; GUE/NGL Political advisor A; Sidenius, interviews, March 2011.

merely a strategy to achieve the necessary winning coalition or did it go beyond a pure calculation of cost and benefits?

This chapter has compared the expected patterns of behaviour under consent with those of the co-decision procedure. The objective was to assess the explanatory power of the co-decision models and to help understand the mechanisms behind the change in the policy preferences of the EP. The application of models to SWIFT showed that they still hold explanatory value under the consent procedure. Although this might weaken the value of the models, an in-depth examination of the case study reveals that the reasons for the fit are not based on the construction of the models but on the changing patterns of behaviour under the consent procedure. In this sense, the models have proved their explanatory power by highlighting the gaps between the expected patterns of behaviour and the empirical evidence. In this sense, although the two models have raised divergences in the layers of action, they also coincided in the 'directionality' and shape of change.

The rational-choice model has shown that, during the first vote, MEPs followed the expected patterns of behaviour. They evaluated the cost and benefits of the interim agreement and compared it to the *status quo* (i.e. having no EU-US agreement). Since the text was considered to contain too many controversial issues that conflicted with its policy preferences, the EP preferred to opt for the *status quo*. The rejection was possible because a left-wing coalition managed to gather enough votes to form a winning majority, which included the socialists and liberals. However, the explanations for the U-turn operated by the EP during negotiations for the permanent agreement are more difficult to find under the rationalist model. Certainly, the reasons for accepting or rejecting the agreement were the same for those groups that did not change their position radically (namely, ECR and EPP on the right of the spectrum; Greens and ECR on the left side). Some other *ad hoc* explanations can be found for specific individuals, such as the socialist group leaders or the rapporteur. However, the rationalist model has difficulties in teasing out wider rationales for ALDE and S&D as a whole.

This difficulty in explaining the change in the policy preferences of the groups that were central to forming the winning coalition in July 2010 highlights the existence of wider dynamics that occurred beyond the formal rules of the Treaty. By focusing on the formal aspects of decision-making, rationalist explanations can only partially explain why the US, the Commission and the Council made such significant efforts in accommodating the views

of the EP. The efforts of these other actors in incorporating the EP in negotiations can be understood as a reaction to their higher 'sensitivity to failure'. However, it does not explain why the EP did not use the shadow of rejection to obtain more significant changes. It is especially difficult to understand why liberals and socialists considered that the new 'twin-track' approach changed the calculation of cost and benefits so substantially that a second rejection was not an option. Therefore, the difficulties of the rationalist model in explaining the vote on the permanent agreement show that either the model needs to be changed to hold more explanatory power for the consent procedure, or that the EP did not follow the patterns of behaviour expected under this decision-making process.

In this sense, the constructivist model complements the explanations on policy preference change and answers the puzzle raised by the rationalist explanation. First of all, the constructivist model explains the rejection of the interim agreement as a successful attempt to mobilise procedural 'meta-norms' advocating more institutional and policy competences for the EP in the AFSJ. These 'meta-norms' linked the increase in EP competences to substantive 'meta-norms' advocating the need for strong data protection controls when negotiating with the US. Therefore, the decision to reject was easily mobilised, since it resonated well with these 'meta-norms'; shared by a wide number of MEPs. The rejection offered a unique opportunity to assert the powers of the EP while, at the same time, being able to claim that it was done for the good of EU citizens. Policy and institutional interests merged perfectly together and rendered the decision more legitimate.

At the same time, the constructivist explanation also offers an alternative understanding to the change in policy preferences after the rejection. First, it shows how the uncertainty left by the negative vote created the perfect environment in which to re-interpret the rules of the treaty. The willingness of all the other actors to have a SWIFT Agreement signed as quickly as possible made them more receptive to demands for institutional change. Therefore, the EP was very effective in becoming a discursive entrepreneur that demanded to be involved in negotiations as early and as fully as possible. The discourse was rapidly accepted by all the other participants and therefore its effects were amplified and legitimised. As a result, the consent procedure passed from formally excluding the EP from negotiations to taking the form of a '*quasi-co-decision*'.

The constructivist explanation also highlighted the lack of resonance between policy preferences and the expected patterns of behaviour under this new informal

understanding of consent. Now that the consent procedure had been transformed into something akin to co-decision, the EP was required to be more consensual and take 'responsibility' on the policy outcomes agreed during negotiations. At this point, the same mechanisms of change that had already been put in place after the expansion of co-decision in 2005 were triggered. Those actors involved closely in negotiations took the role of discursive entrepreneurs and attempted to convince the outsiders of the process that more consensual behaviour was necessary. In this sense, the inclusion of a 'twin-track' approach can only thinly disguise the efforts made not to cross the red lines of the US. As it had happened before under the 'Data retention' directive, EP leaders and negotiators placed great emphasis on the necessity of being 'responsible' in order to be effective. 'Responsibility' was once more equated to 'pragmatism', i.e. the need to be more flexible in its policy positions in order to find a successful compromise. In this case, the reference to 'responsibility' had the added weight of ensuring the continuation of fruitful and constructive transatlantic relations.

In sum, the use of models has been useful to achieve three different objectives. First, they have identified the shifts in the patterns of behaviour, either by being unable to explain the behaviour of political groups in relation to their expected behaviour or by examining the role of discourse during the informal transformation of these patterns of behaviour. Second, both models have successfully endogeneised the main potential external source for change. The role of the US could have been seen as an external factor; however, by endogeneising it (i.e. considering it as another actor of EU policy-making), the models have been able to show that the presence of the US simply reinforced internal EU dynamics already present at the time. Therefore, the influence of the US on the EP's change of preferences cannot be understood on its own; it has to be incorporated into internal EU dynamics. Finally, as for previous occasions, the use of models has maximised the number of explanations; the two models complement each other and fill the respective gaps.

At the same time, the two models highlight different layers of and motivations for change. The empirical application of the models points at two important elements. First, the two explanations identify different layers of institutional change: a formal layer derived from the textual application of decision-making rules and an informal layer appealing to broader norms of behaviour. Second, the models point at synergies between the layers; formal and informal explanations are cumulative and reinforce the 'directionality' of

change, which renders the transformation in policy preferences easier to perform and more legitimate.

In terms of 'directionality', both rationalist and constructivist explanations point towards the change in the policy preferences of the EP. The first looks at the distribution of preferences and the calculation of costs and benefits to understand policy change. In February 2010, the cost of the agreement was deemed too high and therefore a left-wing coalition could gather a winning majority. In July, the cost of no agreement turned out to be too high for a majority of MEPs and thus they created a winning coalition that would ensure the ratification of the Agreement. On the other hand, the constructivist explanation looks at shifting dynamics between policy and institutional preferences. The increasing lack of resonance between policy preferences and a new informal understanding of the consent procedure offered new opportunities to those wanting to change the direction of the vote. Crucially, the fact that both layers point in the same direction (i.e. towards change in the policy preferences) helps to understand why a U-turn in the priorities of the EP was possible and quickly achieved. It also explains why such a move was hardly contested at the plenary level.

Frictions between institutional and policy preferences may have a significant effect on policy outcomes. SWIFT clearly shows that the willingness to ensure a leading role for the EP in international agreements came at the expense of its traditional liberal position on data protection issues. Although the EP was more effective in raising the standard of data protection, the final result came short of expectations. More importantly, the necessity to find consensus and compromise seems to have been internalised by EP actors, who are now more reluctant to use the 'nuclear' power provided by the consent procedure. This change in the policy preferences of the EP may have serious implications for future negotiations. In this sense, the re-negotiation of the EU-US PNR agreements (under way) can prove to be the next test for the future of EU data protection principles. The legacy of SWIFT will be a difficult one to follow; it might prove more challenging to contest the necessity of instruments that also aim to share personal data with US authorities and to ensure the proportionality of the use that the US makes of these data.

Chapter 8: Institutional Change – Conditions and Driving Forces

Introduction

The previous three chapters have offered an in-depth explanation of three negotiations and compared two different decision-making procedures: co-decision and consent. The conclusions of the different case studies offer numerous similarities but also differ in important aspects. The purpose of this chapter is to offer an overview of the dynamics observed in the empirical analysis. The objective of the comparison is to understand the reasons behind the EP's change of policy preferences; therefore, this chapter focuses on the conditions that facilitate change as well as the main drivers necessary to trigger the process of institutional adaptation.

The use of theoretical models has helped to identify the different layers and 'directionality' of change. The specification of a set of conditions should help to compare the case studies and render the findings easier to generalise. This chapter also attempts to classify these different conditions into categories that can be used for other studies of policy preferences or, more generally, for studies of institutional change.

The chapter looks first at the conditions for change and classifies them in relation to the level of analysis (micro or macro) in which they operate. The rationale for this classification lies in the assumption that by separating these two levels of analysis, it will be easier to identify the forces triggering and driving the change, which, in turn, will provide a higher explanatory value. Therefore, the second part of this chapter uses the comparison of the conditions for change in each case study to explore the main driving forces behind the process of adaptation of the LIBE committee to the new patterns of behaviour introduced by co-decision and consent.

8.1. Conditions for change of policy preferences

Rittberger (2003, 12) considers that, in order to identify and explain institutional change, one must identify the different institutional layers (i.e. institutional elements or phenomena) and understand their effect on the behaviour of actors. Only when these institutional layers have been explained and their mechanisms identified, is it possible to examine the relationship between macro-structures (institutions) and micro-behaviour (actors) (Rittberger 2003, 3). In this sense, the change in the policy preferences of the EP sits at the intersection of these two levels: the change of policy preferences reflects the individual choices of MEPs (micro-behaviour) but it is framed and constrained by a wider institutional context (macro-structure).

The theoretical models have proved essential to uncover the different layers of change. On the one hand, they have revealed a set of layers connected to the patterns of behaviour developed under each decision-making procedure. There, a formal layer emphasises the importance of (written) rules (such as the higher majorities required in the EP for the second-reading vote), while an informal layer appeals to common understandings of behaviour (namely, consensus and ‘responsibility’) that legitimise certain choices. These two layers inform the behaviour of actors and guide their choices during negotiations. For instance, the pressure to close agreements at the first-reading level is motivated by formal rules of procedure – the higher majorities in the second reading are a risk in a parliament where neither right nor left enjoys a clear majority³²⁷; however, first-reading deals are widely accepted and hardly contested because they are perceived as a source of efficiency – an illustration of their ability to find inter-institutional compromises³²⁸.

On the other hand, the theoretical models have also looked at the importance of another symbolic layer, which emphasises specific ‘meta-norms’. These ‘meta-norms’ are composed of procedural and substantive dimensions that guide choices during the process of decision-making. The procedural dimension is based on specific understandings of the surrounding institutions. As we have seen, co-decision is not just a formal rule of

³²⁷ EP official A; Speiser; Council official A and C, interviews, January 2009; Weber, interview, December 2009; ALDE political advisor B; Sidenius, S&D political advisor, interviews, March 2011.

³²⁸ Alvaro; EP official A, interviews, January 2009; Commission official D, interview, March 2010; ALDE political advisor A; GUE-NGL political advisor A, interviews, March 2011.

procedure but has developed into a specific pattern of behaviour promoting consensus and compromise. There is also a substantive dimension formed from diverse (and often competing) interpretations on how to tackle specific political challenges. The AFSJ has been characterised by a long-term tension between a more security-oriented response to current challenges such as terrorism or migration and a rights-based approach that prioritises civil liberties and human rights.

In consequence, this section takes stock of the layers of change identified by the empirical application of the theoretical models and develops a set of conditions for policy preference change. In order to underline the relationship between macro-structures and micro-behaviours, the different conditions for change have been classified in relation to these two levels of (institutional) change.

8.1.1. Macro-structures: Procedural and substantive dimensions of change

Macro-structures are composed of those elements that organise and guide the actions of actors at the micro-level. In this sense, they offer meaning and legitimacy to their behaviour. As seen above, the main macro-structures in the context of the LIBE committee are composed of various layers of change appealing to both the expected patterns of behaviour and the 'meta-norms' guiding this behaviour. These different elements of the macro-structure surrounding the change of policy preferences in the EP give rise to specific conditions that shape and facilitate (or impede) adaptation.

Three conditions can be identified from the previous empirical analyses. The first condition is the product of the procedural dimension of the macro-structure: uncertainty in the institutional patterns of behaviour creates a window of opportunity that facilitates change and adaptation. The second condition is the product of the substantive dimension: the levels of salience in the process of securitisation (the main rationale of the AFSJ) shape and constrain specific understandings of policy alternatives. Finally, the last condition sits in-between layers; it is the product of tensions and frictions between the procedural and substantive dimensions of the macro-structure.

8.1.1.1. Procedural uncertainty

The first condition that becomes manifest in the empirical analysis is the importance of well defined procedures. It refers to the procedural dimension of the macro-

structure. When there is a shared and well-established understanding of formal and informal procedures, the opportunities to introduce changes decrease. Procedures can be interpreted either through legal texts (e.g. using inter-institutional agreements) or practice. The more precise formal rules are in the Treaty, the less likely that opportunities will arise to modify their understanding through informal practices. Therefore, the questions of timing and procedural uncertainty are essential to open a window of opportunity for institutional adaptation.

As seen in the three case studies, timing was important to trigger change and also to justify it. The fact that they were either the first co-decision dossiers in their specific policy area (counter-terrorism in the case of the 'Data retention' directive; irregular immigration for the 'Returns' directive) or the first occasion for the EP to give its consent to an international agreement dealing with internal security matters was essential for triggering a change in behaviour. This was especially the case on the two cases where the change of procedure had occurred very recently. In the case of the 'Data retention' directive and SWIFT, the window of opportunity was wider than in 'Returns'. The first two occurred only months after the change in decision-making, when there were no common understandings of how the rules should be applied.

In both cases, there was no precedent on which to base their behaviour and/or no time to learn from other committees. In the case of the 'Data retention' directive, the pressure put on the LIBE committee by the UK presidency (requiring the completion of negotiations in the space of only three months) forced the adaptation to co-decision. LIBE did not get the chance to produce its own understanding of the rules; which explains the persistence of its past confrontational behaviour. In comparison, in the case of SWIFT, the existing patterns of behaviour for the consent procedure were too narrow – since they had been developed for agreements that fulfilled more symbolic functions, such as enlargement (W. Wessels & Diedrichs 1997, 8), instead of dealing with the content of specific policies. Therefore, the LIBE committee was presented with a perfect occasion to contest the existing understandings of the procedure (which considered the ratification of the agreement by the EP a *fait accompli*³²⁹) and offer its own interpretation of the rules – which were relatively vague in the Treaty of Lisbon.

³²⁹ Hennis-Plasschaert, interview, March 2010; Sidenius, interview, March 2011.

The case of the 'Returns' directive was slightly different. There, the time span between the start and the end of negotiations was significantly longer (more than two and a half years), which had clear effects on the understandings of the patterns of behaviour. First, other negotiations already finalised under co-decision (especially the 'Data retention' directive) created a precedent. Whether the handling of past negotiations was seen as positive or negative depended largely on each political group. For instance, the 'Data retention' directive was seen by the EPP as a final breakthrough and a chance to emerge from their isolation; instead, for ALDE, it put additional pressure to adapt and be included in the game. Second, the longer time span offered an opportunity to learn from other committees and copy their working patterns. Most notably, there were influences from the ENVI (environment) committee³³⁰, one of the committees to have worked the longest under co-decision (Burns & Carter 2009). As a result, during negotiations on the 'Returns' directive, the patterns of behaviour were more similar to other co-decision negotiations. In fact, those involved in negotiations considered that the 'Returns' directive was a good example of a 'normal' co-decision file, while the 'Data retention' directive was seen as an exception³³¹.

The question of time (in relation to procedural uncertainty) is certainly important. The longer the time span, the more precise the informal understandings of the rules become; which, in turn, reduces the capacity to contest or redraw the patterns of behaviour. For instance, the 'Returns' directive played a crucial role in consolidating the behaviour of the LIBE committee under co-decision³³². The significant changes introduced in the compromise text after the LIBE vote were heavily criticised by some of its members. They considered that the committee had not benefited from enough occasions in which to offer feedback to the rapporteur and give him a mandate for negotiations with the Council³³³. After the 'Returns' directive and some other first-reading deals, some members of LIBE felt increasingly marginalised³³⁴; according to an EP official, they considered that rapporteurs would "show a horse to the committee and come back with a camel after negotiating with the Council"³³⁵. As a result of this perceived lack of transparency, the committee introduced

³³⁰ ALDE political advisor B, interview, March 2011.

³³¹ EPP staff. S&D political advisor, interviews, March 2011.

³³² Sidenius, interview, March 2011; Commission official C, interview, April 2011.

³³³ EPP staff, interview, March 2011.

³³⁴ ALDE political advisor A; EPP staff, interviews, March 2011.

³³⁵ EP official A, interview, January 2009.

an ‘orientation vote’ before the official committee vote, which acted as a mandate for the rapporteur and introduced an informal extra reading to the procedure³³⁶.

In consequence, a comparison of the three negotiations shows that periods of procedural uncertainty can offer an ideal occasion for change entrepreneurs, who may use this window of opportunity to offer their own interpretation of the rules and the expected patterns of behaviour. These interpretations are often based on informal practices or simply copy the behaviour of other committees. Once the rules of the game become accepted and shared by those participating in it, it is more difficult to introduce or modify these new shared understandings of the rules.

8.1.1.2. Salience of securitisation

The second condition that can be inferred from the case studies refers to the impact of securitisation processes (understood as the broader political and substantive context of this policy area) on the choices of actors. The use of securitising discourses and practices at the EU or domestic level have a significant role at legitimising specific options. In this sense, these discourses appeal to the substantive dimension of the macro-structure. On those occasions where securitisation discourses acquire more salience, negotiations are covered with a veil of urgency (or even emergency). In an area like the AFSJ, this sense of urgency (Apap 2003; Bigo 1998; Guild et al. 2009, 13) can amplify the pressure to change those policy preferences that do not fit with this understanding of security.

The case studies dealt with two specific policy areas: data protection in the broader context of counter-terrorism and irregular immigration. These two areas proved significantly different, since they exerted different types of political pressure on the EP. Both areas have been politicised for a long time; counter-terrorism especially since the 11 September 2001 attacks (Den Boer & Monar 2002; Neal 2009) and irregular immigration especially since the 1990s, when the change in the economic situation of most European countries led to the gradual securitisation of European migration policies (Geddes 2000; Huysmans 2000, 2006). In both areas, the degree of securitisation is not stable but increases and decreases depending on events and the use made of such issues by political actors. In this respect, the case studies are good examples of these fluctuations; they also show that,

³³⁶ Ibid.; EP official B; Commission official D, interviews, March 2010; ALDE political advisor A and B; EPP staff, interviews, March 2011.

despite highs and lows in the degree of securitisation, there is a specific rationale that guides the choices of actors.

The 'Data retention' directive and SWIFT negotiations were framed by the issue of terrorism. In both cases, the challenge of international terrorism increased the salience of the policy instruments and constrained the political debates. There was an on-going discourse that used the potential risks of new terrorist attacks to increase the number of security tools (Balzacq 2008b). The issue of terrorism raised concerns about the security of EU citizens – the main 'meta-norm' used to legitimise the choices made by member states and the EP³³⁷. Consequently, the changes in the policy preferences of the EP were easier to legitimise when it appealed to the necessity to develop tools supposed to protect EU citizens from potential attacks.

Certainly, the salience of terrorism as a legitimising discourse was not constant. In this sense, the 'Data retention' directive and SWIFT are good examples of the fluctuation in its level of salience. In the first case, the salience of terrorism was at one of its highest points. After the attacks of Madrid in March 2004 and London in July 2005, the issue was extremely politicised. In addition, negotiations on a 'Data retention' directive were led by the UK, which was particularly interested in obtaining results. The British presidency (and Clarke in particular) pushed for an EU instrument because it would have been difficult to pass it at the domestic level. In this sense, the immediacy of the attacks legitimised the speed and urgency of negotiations. In comparison, during the SWIFT negotiations, albeit still important, there were more divergent voices that questioned the necessity of a TFTP system. There, the debate around the right balance between security and liberty was opened once again³³⁸.

However, it is interesting to note that, despite the efforts to question the proportionality and adequacy of a TFTP system (very much at the core of the February 2010 rejection), the support given to the Agreement was eventually justified on grounds that resonated with securitisation discourses. There, once again, MEPs appealed to the potential risk to EU citizens to legitimise the change of EP policy preferences. Certainly, these arguments resonated better with the preferences of the right and centre of the

³³⁷ MEP assistant A, interview, November 2009; Hennis-Plasschaert; Busuttil, interviews, March 2010.

³³⁸ Commission official F, interview, July 2010.

political spectrum than with those of the left-wing groups. The Greens and the radical left were still sceptical about the necessity to have a TFTP system (or to help the US to render their system functional)³³⁹. However, it is significant that some groups started to use the same arguments that were once those of the Council. For instance, inside the EPP, the question on the proportionality and necessity of tools such as data retention, TFTP or PNR was reversed: traditionally, these type of instruments were only deemed acceptable after a careful examination of their necessity and proportionality from a rights-based position; in comparison, the EPP considered that such tests were not necessary if law enforcement agencies deemed that these kind of tools were essential to protect EU citizens – in their eyes, security experts are in a much better position to evaluate the necessity of counter-terrorist tools than decision-makers³⁴⁰. Therefore, even if the salience of terrorism decreased after 2005³⁴¹, it was still a legitimising discourse used by actors.

The situation in the area of irregular immigration was slightly different in nature. As we have seen, it was an area where the EP's preferences were not as solid as in the area of data protection and counter-terrorism (Lahav & Messina 2005). The issue of migration also lacked an essential legitimising element: it did not directly affect EU citizens. In this sense, it was more difficult to legitimise higher standards of protection for TCNs in a political context (and domestic debates) that tended to present these issues from a restrictive perspective. In addition, the issue was more divisive inside the EP because it was largely influenced by national debates, which were often uploaded to the EU level and increased the salience of specific negotiations. The 'Returns' directive is a good example of the connection between national and European debates: due to the central role that migration had in the French presidential elections, the French campaign was largely responsible for politicising and increasing the salience of the 'Returns' directive³⁴². As a result, the French delegations were more politicised and had more radical positions than other delegations inside the same political group. This difference was especially visible

³³⁹ Albrecht, interview, March 2010; Sidenius; GUE-NGL political advisor A, interviews, March 2011.

³⁴⁰ EPP staff, interview, March 2011.

³⁴¹ ALDE political advisor B, interview, March 2011.

³⁴² Sidenius, interview, March 2011.

given that the socialist shadow rapporteurs were French, which clearly shifted the positions of their group towards the left of the political spectrum³⁴³.

In the area of migration, the tendency to securitise borders and exclude TCNs from the territory became more difficult to contest. For instance, during negotiations on a 'Returns' directive, debates centred on the length of detention and the extent of protection for TCNs. However, few voices were raised that questioned the necessity and adequacy of a system to return irregular migrants. Only the radical left consistently opposed the idea of returns and detention throughout negotiations, but their position was seen as too extreme and 'irresponsible'³⁴⁴. This is mainly due to the fact that challenges to the mainstream discourse were not electorally rewarding, since the issues did not affect EU citizens directly and were, thus, difficult to sell back home³⁴⁵. Given the extent of domestic debates around migration issues, it is difficult to conceive that an issue such as 'Returns' could be a deal breaker in any re-election.

In consequence, it is evident that the process of securitisation was present in the three cases; however, it fluctuated and took different shapes which, in turn, affected the chances of certain entrepreneurs to change the policy preferences of the EP and to legitimise this change. At the substantive level, the more salient securitisation was the easier to initiate the change of policy preferences. At the same time, the claims used to legitimise this process of adaptation appealed to substantive 'meta-norms'. Those measures that were claimed as necessary for the security of EU citizens were more easily justified and legitimised; at the same time, those measures that only affected the rights of TCNs benefited from the insulation of European debates and bore no electoral consequences for MEPs. Therefore, those groups that decided to change the policy preferences of the EP and adopt more security-friendly measures could either justify their actions in the name of EU citizens, or be relatively confident that they would not be punished in domestic elections.

8.1.1.3. Misfit between institutional and policy preferences

Finally, the last condition sits at the intersection between the two previous ones. The empirical analysis underlines the necessity to have a certain degree of misfit (or misalignment) between procedural and substantive elements to trigger a change in the

³⁴³ ALDE political advisor A, interview, March 2011.

³⁴⁴ Hennis-Plasschaert; MEP assistant B, interviews, March 2010.

³⁴⁵ MEP assistant A, interview, November 2009.

policy preferences. It is precisely the tensions and frictions between the new patterns of behaviour and the traditional policy preferences that create the “seeds for change” (Lieberman 2002, 702; Rittberger 2003, 13). The presence of misfit occurs in all three cases, which leads one to assume that it is a necessary condition for change. Without a certain degree of friction between procedural and substantive layers, there would be no need to modify the policy preferences of the EP.

In this sense, the three case studies have shown that this change was triggered by the introduction of new decision-making procedures (new, at least, for that specific set of actors), which put pressure on their patterns of behaviour and initiated a process of institutional adaptation. In the case of the ‘Data retention’ and the ‘Returns’ directives, the patterns of behaviour expected under co-decision collided with the traditional behaviour of LIBE. The necessity to adopt a more consensual behaviour – necessary to find a compromise with the Council – did not fit with the confrontational behaviour and the policy preferences of the committee. These preferences (very vocal on civil liberties and fundamental rights) were normally too distant from those of the Council, where a more restrictive understandings of internal security matters prevailed (Elsen 2010). Under co-decision, the policy preferences of the Council and EP needed to converge in order to make compromise possible.

In the cases of the ‘Data retention’ and the ‘Returns’ directives, the EP accepted a deal that was removed from its traditional policy preferences. The change to co-decision underlined the distance between the policy positions of the Council and the EP and made more pressing the need to adapt the behaviour that accompanied these traditional positions developed under consultation. In the first case, the perceived misfit between policy preferences and the willingness of the EP to consolidate its role in the AFSJ justified the formation of a ‘grand coalition’ that ultimately by-passed the opinion of the LIBE committee. In the case of the ‘Returns’ directive, the refusal of the Council to come closer to the views of the EP underlined the gap between the traditional preferences of LIBE and those of member states, which could not be reconciled with its previous confrontational behaviour.

In the case of SWIFT, the misfit was almost self-imposed. In principle, the LIBE committee could have maintained the same confrontational behaviour. The rules of the Treaty allowed only for a positive or negative reaction to a ready-made text; if the

international agreement departed too much from its traditional preferences, the EP only had to withdraw its consent. However, by compelling the other actors to accept a new informal interpretation of the rules – whereby the consent procedure became a *quasi*-co-decision, the EP triggered the same misfit that had appeared with the introduction of co-decision. The new interpretation involved the EP informally from the earliest stages of the procedure. This shift modified the patterns of behaviour substantially, since, after that, the EP was held responsible for the outcome of the compromise agreement. Once more, the EP felt it was necessary to adopt a more consensual behaviour – on this occasion so that a compromise could be found with the US. The need to find a compromise with the US highlighted the misfit between the policy preferences of the EP and those of the US and the Council. The only solution to close this misfit and ensure the success of negotiations was to change the policy preferences held until the rejection of February 2010 and accept an agreement that sacrificed the core safeguards requested by the EP for years – namely, the elimination of a ‘pull system’ based on ‘bulk data’.

In addition, as the case studies have shown, it is important to look not only at the extent of misfit but also at the ‘directionality’ of change. If all the institutional layers (procedural and substantive, formal and informal) are cumulative instead of competitive, it will be easier to adapt the behaviour of actors and legitimise change. In this sense, in all three case studies, the patterns of behaviour of co-decision (or the new interpretation of consent) formally pushed towards more consensual behaviour; at the same time, the wider discourses and informal understandings of the rules reinforced the necessity to be consensual and to behave ‘responsibly’.

In addition, the procedural and the substantive dimensions reinforced these new understandings. For instance, in the ‘Data retention’ directive and SWIFT, the idea of ‘responsibility’ resonated both at the procedural level (the EP had to show it was able to find compromises with the Council) and at the substantive level (MEPs should ensure that their decisions protect EU citizens from a potential terrorist attack). In this sense, the more all these forces pushed towards the same direction of change, the easier it was to close the misfit and to legitimise the change of policy preferences.

8.1.2. *Micro-behaviour: Agents and coalitions*

As we have seen, macro-structures offer meaning and legitimacy to the behaviour of actors, i.e. the micro-level. This micro-level is, in turn, composed of formal and informal layers that guide and constrain choices and actions. In this sense, the micro-foundations of change are geared towards the actions of agents: individuals (and the choices they make) matter when explaining institutional change. Despite the constraining effect of institutions (as macro-structures), actors still have the capacity to choose between different options. They can facilitate change by embracing and promoting it, or they can contest and oppose the structural conditions that favour change.

From the empirical analysis, two categories of conditions have become visible. The first category focuses on the actions of individuals. Single actors can promote change by appealing to certain elements of the macro-structures (i.e. using discourses that resonate with 'meta-norms' at the macro-level) or resist it – hence, slowing down or stopping adaptation. However, the pressure to adapt can be endogenous or exogenous – the necessity to change the policy preferences may originate within the LIBE committee or be imposed by external actors. Consequently, the first category is divided into two distinct conditions: pressure to adapt emerging from within the LIBE committee – i.e. by individual actors or groups inside the committee that seek to change the preferences of the EP; and demands of change made by actors external to the LIBE committee – especially from outside the EP.

The second category looks at the effects of formal rules on the micro-behaviour of groups. The search for the majorities necessary to reach the voting thresholds indicated in the Treaties puts pressure on the different EP groups when they attempt to form winning coalitions. This pressure plays an important role when deciding whether to continue into a second reading or not. In this sense, the presence or absence of certain patterns of coalition-building can affect the behaviour of particular groups, which will feel more pressure to adapt and change their preferences.

8.1.2.1. *Agents for change internal to LIBE*

Specific actors can be essential to ensure the success or failure of negotiations. In co-decision (and now also in the consent procedure), 'relais actors' hold a higher gate-keeping power. Essentially, in any EP committee, rapporteurs and shadow rapporteurs (to a lesser

degree) have a disproportionate amount of influence. Those following negotiations stressed the importance that individual styles and personal positions of rapporteurs played in shaping outcomes and procedures³⁴⁶. For instance, those rapporteurs coming from the left side of the political spectrum generally tended to raise the standards of protection and set the bar quite high, knowing that the Council would decrease it and that member states would try to water down the text³⁴⁷. In comparison, the right-wing preferred to limit the number of amendments, hoping that, by being more modest in their requests, the Council would consider their positions more reasonable and would not rush into watering down the text³⁴⁸.

The relationship with (and involvement of) shadow rapporteurs can also be crucial to ensure the success of negotiations (Judge & Earnshaw 2011). Synergies between key actors and fruitful cooperation eased the construction of coalitions and made it easier for other groups to feel 'responsible' for the outcome of the text³⁴⁹. In this sense, the case studies are relevant examples of the role that rapporteurs and shadow rapporteurs could play in negotiations. For instance, in the 'Returns' directive, the fact that the rapporteur was from the EPP-ED was an essential factor for facilitating adaptation. If the rapporteur would have been from the radical left, the dossier would have been blocked and everything done to ensure the failure of negotiations³⁵⁰. At the same time, the personality of Manfred Weber, the rapporteur, who was open to other groups and listened to a wide array of opinions (even inviting NGOs to share their experiences and expertise), facilitated the adaptation to a more consensual behaviour. If the rapporteur would have been another EPP-ED member with more radical views on the issue and less open to dialogue, other groups might have been more predisposed either to block negotiations or to attempt the formation of a left-wing coalition³⁵¹.

At the same time, other individual roles such as committee chairs and political groups' coordinators can be essential when making key decisions – such as choosing the rapporteur; they can also control the type and frequency of contacts between the committee

³⁴⁶ MEP assistant A, interview, November 2009; Sidenius; ALDE political advisor B, interviews, March 2011.

³⁴⁷ GUE-NGL political advisor A; EPP staff, interviews, March 2011.

³⁴⁸ EPP staff, interview, March 2011.

³⁴⁹ ALDE political advisor A, interview, March 2011.

³⁵⁰ GUE-NGL political advisor B, interviews, March 2011.

³⁵¹ Sidenius, interview, March 2011.

and the external world and between members of the committee and EP leaders. Even LIBE committee officials can be more conducive to change; for instance, in the daily organisation of committee affairs, they can be more or less inclusive (which is essential for smaller groups in order to be kept informed and integrated) and bias the content of the committee's policy preferences³⁵². For instance, as seen in Chapter six, it seems that group coordinators decided to give the 'Returns' dossier to the EPP, despite the fact that the radical left would have been entitled to appoint a rapporteur from their group³⁵³. As seen above, this decision would have led negotiations in a completely different direction. As for committee chairs, the role played by the LIBE chairman during the first SWIFT negotiations is probably the best example of individual entrepreneurship. Since his national party was in charge of the presidency, the chairman did not hesitate to put pressure on other committee members so that they would vote in favour of the agreement³⁵⁴. He also acted as change entrepreneur at the end of the second round of negotiations, by rushing the compromise and persuading EP leaders that the committee was ready to vote in favour of the new text³⁵⁵.

These examples show that – whatever the style of negotiations –, it is important to have some individuals acting as change entrepreneurs in order to trigger adaptation inside the committee. For instance, the rapporteur in the 'Data retention' directive was clearly opposed to the policy preferences of the Council and would have preferred to block any attempt to change the preferences of the EP, so that the committee could maintain its traditional confrontational behaviour. As seen above, the introduction of co-decision opened a gap between this traditional behaviour and the need to find compromise with the Council. This misfit between the policy preferences of LIBE and the patterns of behaviour required under co-decision set the necessary conditions for change. However, in the absence of any alternative entrepreneur inside LIBE, the pressure for change had to come from the outside. The decision to by-pass the LIBE report at the plenary level and the response of the rapporteur, who withdrew his name from the report, are clear examples of exogenous forces imposing a change of policy preferences on the EP.

³⁵² MEP assistant B, interview, March 2010; GUE-NGL political advisor A, interview, March 2011.

³⁵³ GUE-NGL political advisor B, interviews, March 2011.

³⁵⁴ Hennis-Plasschaer, interview, March 2010.

³⁵⁵ Alvaro, interview, July 2010.

In comparison, both in the 'Returns' directive and in the re-negotiation of SWIFT, the agents for change came from inside the committee. These two cases show how the internal pressure to change the behaviour and the policy preferences of the LIBE committee came from the EPP and ALDE (to a certain extent), who became the clearest change entrepreneurs. In the case of the 'Returns' directive, the EPP-ED and ALDE used discourses appealing to the necessity of being 'responsible' during the first co-decision on irregular immigration in order to trigger a change in the policy preferences of the committee. In the case of SWIFT, from the start, members of the EPP (supported by the conservative ECR group) attempted to change the direction of LIBE and presented alternative solutions (like the postponement of the plenary vote) and understandings of the most problematic issues (as with the creation of a new 'twin-track approach') in order to find a more consensual solution. Once the patterns of behaviour changed and became similar to those in co-decision, ALDE (and most of the socialists) joined the conservative groups in their appeal for more moderate policy positions and acceptance of the US red lines.

In conclusion, the existence of internal entrepreneurs advocating a change in the policy preferences of the committee proved essential to start the process of adaptation inside LIBE. It is also important to underline that the principal change entrepreneur in the EP was the EPP group, which had previously been an outlier of the committee despite being one of the major political forces in the EP as a whole.

8.1.2.2. Agents for change external to LIBE

Pressure for change can also originate outside the committee. In this sense, other actors may have an interest in triggering change in the policy preferences of LIBE. Due to past dynamics of conflict and opposition, the Council was the most visible external agent for change. Pressure from the Council came from different sides. First, the various presidencies were the most visible change entrepreneur. Since they led negotiations, they could extract compromises from the EP and demand more consensual positions of the rapporteur and shadow rapporteurs. Although all case studies showed instances of external pressures to adapt, it was in the case of the 'Data retention' directive, that the external sources of change proved most effective. In this case, the pressure put on the EP originated mostly from the British presidency³⁵⁶. The presence of a clear discursive

³⁵⁶ Alvaro; Commission official B, interviews, January 2009.

entrepreneur (the presidency, and Home Secretary Clarke in particular) made it easier to trace and identify the agents for change. In view of the resistance showed by the LIBE committee during negotiations, the British presidency almost forced the change upon the EP, coming time and again with demands for adaptation.

On other occasions, the external pressure was more diffuse. In the 'Returns' directive, there seemed to be some indirect sources of pressure, mostly from national governments. For instance, the French shadow rapporteurs were influenced by the domestic politicisation of migration issues, which led them to resist the change of policy preferences. On the other hand, it seems that the Dutch government exercised some power of persuasion on some negotiators in order to achieve a compromise more suitable to member states' interests³⁵⁷. In the case of SWIFT, the dynamics of external pressure were more complex. During the first SWIFT negotiations, the EP was under considerable pressure, but this pressure was not coherent and often pushed the MEPs towards opposite directions of change. On the one hand, the presidency, the US and some member states concerned about the transatlantic consequences of a rejection tried to change the EP's policy preferences in order to ensure its ratification. On the other hand, the German coalition government (and the liberal partner in particular) lobbied its MEPs to convince them to vote against the Agreement³⁵⁸. The strategy of the German government (reinforced by the actions of Viviane Reding) was certainly effective, since most German delegations defected from their respective political group and voted along national lines³⁵⁹.

In view of these examples, the clearest pattern of pressure seems to be related to domestic party loyalty. When the national party is in government, and thus sits in the Council, EP delegations often decide to vote along national lines and depart from the voting instructions given by their political group. For instance, in the 'Returns' directive, the German and Spanish socialist delegation diverged from the position of the group (which mostly voted against it) and decided to vote in favour³⁶⁰. Similarly, in the first SWIFT vote, the Spanish socialist delegation abstained, despite the fact that the majority of the S&D group voted against the Agreement³⁶¹. Some have noted that, since May 2010,

³⁵⁷ Sidenius, interview, March 2011.

³⁵⁸ Diplomatic source A, interview, July 2010.

³⁵⁹ Diplomatic source B, interview, July 2010.

³⁶⁰ Weber, interview, December 2009.

³⁶¹ Hennis-Plasschaert; Busuttil, interviews, March 2010.

when the Labour party lost the elections in the UK, the British socialist delegation has moved to the left of the political spectrum³⁶².

The second SWIFT negotiations are also revealing. There, external actors (namely the presidency, the Commission and the US) accepted the new interpretation that the EP gave to the consent procedure. The Commission involved the EP fully in negotiations from the earliest stages, while the US and the Presidency treated it as an equal partner, negotiating directly with EP negotiators and letting them introduce crucial modifications in the very last stages. Their actions did not directly trigger the change but helped to solidify the new patterns of behaviour and thus highlighted the misfit between these new patterns and the policy preferences that the EP had held until February 2010. Their demands for more consensual positions resonated with and amplified the internal voices from LIBE arguing for a change in the positions of the EP. Therefore, a visible external pressure can either create the necessary pressure to trigger change or it can, at least, amplify the requests for change coming from inside the LIBE committee.

8.1.2.3. Lack of clear majorities

Finally, change is to a large extent conditioned by the balance of power inside the EP. The composition of the chamber creates a specific environment that facilitates or hinders change. In the two last legislatures, the balance between right and left groups has not been clear-cut. Neither the right-wing nor the left-wing enjoys a clear majority. This situation blurs the direction and pace of adaptation and puts pressure on specific groups. In a way, if majorities were clear, it would be easier to either adapt fully or to resist change. If the right-wing had a clear majority, it could impose a change in the policy preferences by voting consistently in favour of more 'responsible' options (i.e. closer to the views of the Council). In contrast, if the left-wing could always form a winning coalition, it would be easier to resist the pressures to change its behaviour and thus to modify the policy preferences of the EP.

As it now stands, no-one enjoyed a clear majority and, in consequence, it became difficult to predict outcomes³⁶³. The uncertainty around the shape (and success) of coalitions put pressure on all groups, which tried to be more careful and consensual. Under

³⁶² Sidenius, interview, March 2011.

³⁶³ MEP assistant A, interview, November 2009.

co-decision, this uncertainty led groups to moderate their stances; they proposed fewer amendments and tried to improve the quality of reports – especially making sure that amendments were legally sound³⁶⁴. In addition, this sense of caution led to more self-control (or even self-restraint); groups questioned the potential success of initiatives and thought twice about starting new procedures³⁶⁵. This development shows how the difficulty of finding stable coalitions in this legislature underlined the importance of bargaining and coalition-building, which, in turn, created the necessary condition for a more consensual behaviour.

In this situation, some groups were under more pressure than others. Those at the core of coalitions (namely, the larger groups and ALDE) endured the strain of compromise, since they had to show their capacity to adapt to the new patterns of behaviour. ALDE's behaviour was especially put to the test, since under the current situation the liberals became the EP's 'king-maker' (Votewatch 2010b, 12; see also Costello 2011). This position was particularly onerous for ALDE, since the group had traditionally departed from its centrist position in other policy issues (especially economic matters) and had adopted more left-wing policy preferences of the group in this area, which traditionally led the group to join left-wing coalitions (Hix & Noury 2007). These positions were especially visible in data protection issues, where ALDE was more vocal in the defence of civil liberties than in other areas that had a greater focus on law-enforcement.

In consequence, the pressure to be more consensual was especially strenuous for ALDE, who were often forced to change sides and vote with the conservatives. This meant that they had to abandon their particular views on civil liberties and adopt more security-led preferences. This dynamic clearly appeared during negotiations for the 'Returns' directive, where the uncertainty surrounding the composition of the winning coalition forced ALDE to adopt a more 'radical' position than originally desired³⁶⁶. However, the pressure to form coalitions also affected the socialists³⁶⁷, especially its more moderate members. In a certain way, the events of the 'Data retention' directive forced the socialist group to confront the same dilemma faced by ALDE: the PES could either stick to its positions but be sidelined in the process of building a winning coalition or it could

³⁶⁴ Ibid.; ALDE political advisor A, interview, March 2011.

³⁶⁵ GUE-NGL political advisor B, interviews, March 2011.

³⁶⁶ Sidenius, interview, March 2011.

³⁶⁷ EPP staff, interview, March 2011.

compromise on the content, which would make sure that the first co-decision file on internal security matters was a success.

Finally, in the case of SWIFT, the search for majorities was still present during the process of adaptation, but it did not put as much pressure on the LIBE committee as other considerations. The difference between co-decision and consent became here probably more apparent. While the high majorities required by the second reading in co-decision cast a shadow over first-reading negotiations, the binary yes/no vote of the consent procedure rendered coalition-building more straightforward. It was seen as a one-shot game with fewer opportunities to link issues and construct package deals. In this sense, it made it more difficult to evaluate the future consequences of the vote. For instance, the size of the majority that supported the rejection of SWIFT was only visible after that first vote. Just before the vote, even the rapporteur lost track of the numbers and was not sure whether it would be rejected³⁶⁸. On the other hand, during the second vote (on the permanent agreement), those EP political groups in favour of the agreement had to make sure that the majority would be large enough to ensure its success; this explains the formation of an oversized majority regrouping the right-wing groups, liberals and socialists.

Table 8.1.: Conditions for Policy Preference Change

	Macro level		
	Procedural uncertainty	Salience of securitisation	Misfit
DRD	+	+	+
Returns	+/-	+/-	+
SWIFT II	+	+/-	+

	Micro level		
	Internal LIBE agents	Agents external to LIBE	Uncertain EP majorities
DRD	-	+	-
Returns	+	-	+
SWIFT II	+	+/-	+/-

Table 8.1. summarises the relevance of the different conditions for each case study. The categories do not attempt to measure the extent of change, but rather to illustrate and

³⁶⁸ Hennis-Plasschaert, interview, March 2010.

compare the case studies in order to find specific trends. The plus sign (+) indicates that a condition was present and played a relevant role in triggering change. A plus/minus sign (+/-) indicates that a condition was present but did not play a major role in the process of change. Finally, the minus sign (-) indicates that a condition was either absent or that it was only peripheral both in presence and effects.

Although each case presents very different scenarios (with different conditions playing a role in triggering change), there are some patterns that emerge from the comparison. For instance, the presence of misfit seems to be a necessary condition for change. Without friction between procedural and substantive layers of change, there is no reason for the behaviour of the committee to change and adapt. In addition, the patterns of the 'Data retention' directive and SWIFT seem to be more similar than those of the 'Returns' directive. In these two cases, the macro-structural conditions played a bigger role than in the case of the 'Returns' directive. In the latter case, the micro-foundations of change (especially those internal to LIBE) were more favourable to initiate the process of adaptation.

These patterns lead to the broader question of driving forces facilitating the change in the EP's policy preferences. The next section takes stock of the comparative analysis to delineate the main rationales that drove and legitimised the process of policy preference change.

8.2. Driving forces: 'Institutional patriotism' and endogenous pressures

In order to produce change, the presence of one or several conditions is not sufficient. There has to be a driving force that triggers and legitimises change not only in particular situations but also in the longer term. In these three case studies, the two theoretical models have identified two types of mechanisms explaining change in the policy preferences of the EP. The rationalist model has shown the role that bargaining and coalition-building play when negotiating under co-decision. The necessity to reach an agreement (often at first reading) is an incentive to find compromise. The constructivist model has emphasised the role that discursive entrepreneurs have during periods of

procedural uncertainty and contestation. The use of discourses appealing to broader ‘meta-norms’ serves to legitimise the process of adaptation.

However, in order to render change permanent and legitimate, other driving forces need to push forward and create new overarching rationales for institutional change. This last section uses the previous comparison of the case studies to expose the broader driving forces behind the change in policy preferences. The trends emerging from the different conditions point out two distinct driving forces working at different institutional levels. At the macro-level, the presence of misfit between procedural and substantive layers (between patterns of behaviour and policy preferences) underlines the importance of an overarching institutional interest that seeks to constantly increase the influence of the EP. This means that the presence of misfit is not enough to determine the direction of change; a wider driving force needs to choose between patterns of behaviour and policy preferences. At the micro-level, it is the tension between endogenous and exogenous forces that drives the processes of successful adaptation.

8.3.1. Macro-level: ‘Institutional patriotism’ as the primary driving force of the EP

In his review of the European Parliament, Priestley (2008) identified six major battles won by the EP over the last thirty years: the right to approve the budget; the right to participate in European Councils; the right to appoint the Commission; the right to decide on and reform a Statute for MEPs and for reform; the right to legislate; and finally the right to render the Commission accountable. These constant efforts of the EP to increase its influence were clear examples of ‘institutional patriotism’ (Priestley 2008, 9)³⁶⁹. Indeed, when looking at the case studies, this principle seems to have developed into the overriding driving force for institutional change.

All three cases show the willingness of the EP to assert its influence in inter-institutional negotiations. This driving force translated into the necessity to be seen as an

³⁶⁹ I chose the term ‘institutional patriotism’ in order to link it to existing literature. The idea of ‘institutional patriotism’ is not linked to Habermas’ concept of ‘constitutional patriotism’. It is similar to the idea of an ‘institutional agenda’, yet it has a stronger symbolic and performative nature than what an ‘agenda’ could have. The term ‘institutional patriotism’ is an accepted term in scholarship dealing with norms of behaviour in the US Senate (see in particular Matthews 1960).

effective and 'responsible' co-legislator, which ultimately affected the policy preferences of the EP. As seen above, in front of a misfit between institutional and policy preferences, the former prevailed. The case of the 'Data retention' directive is probably the most obvious example. The precise timing and circumstances of the change to co-decision put pressure on the EP; its political leaders deemed it necessary to be effective in the first occasion they had to co-legislate in the area of internal security. The agreement was certainly not satisfactory to most in the EP, but the pressure to be seen as 'mature' enough to become a full partner in the co-decision game was more important than the policy outcome.

In the SWIFT case, 'institutional patriotism' worked at two different levels. During the first vote, it was the driving force behind the rejection of the interim agreement. The negative vote was a very effective way to mark the change in the inter-institutional context. Tired of being left out and ignored in international negotiations, the EP forced the other actors to wake up and pay attention to the views of the parliament. In contrast, during the second round of negotiations, 'institutional patriotism' worked in a similar way to co-decision: now that the EP was finally involved in negotiations, it had to make sure that it would be taken seriously. Rejecting the agreement again would have been counter-productive, since the EP would have been perceived by the other institutions (and the US) as an unconstructive actor – always ready to block agreements and ask for more than it could 'realistically' obtain. Therefore, for the sake of its 'institutional patriotism', the EP was willing to ensure that it would be part of the process and that it would be considered as a 'realistic' and 'responsible' actor in future negotiations.

The importance of 'institutional patriotism' can also explain the success (or lack of it) that external forces had in the EP during the two rounds of SWIFT negotiations. In the first round, the extreme pressure exerted by the US, the presidency, the Commission and some other member states backfired because it did not fit with the idea of 'institutional patriotism'. The demands of these external actors would have led to what was seen in the EP as a capitulation of the Parliament's powers after the entry into force of the Treaty of Lisbon. Rubber-stamping a major international agreement contravened the attempts of the EP to gradually increase its influence in the EU. In comparison, during the second round of negotiations, the actions of these external actors helped to drive the change home because they amplified the justifications provided by the EP. The efforts of the US, the presidency, and the Commission to involve the EP and the fact that they allowed MEPs to have a direct

influence on the final compromise resonated with the idea of ‘institutional patriotism’ and thus solidified the efforts of those MEPs that were trying to introduce more consensual views.

Finally, in the ‘Returns’ directive the macro-structural conditions were less relevant than in the other two cases: the time span of negotiations was longer and LIBE had had more time and occasions to learn the expected patterns of behaviour from other committees. However, the driving forces behind some of the key political groups were still directly linked to the idea of ‘institutional patriotism’. In a way, the ‘Returns’ directive was a test-case for the LIBE committee. After its failure to adapt during the ‘Data retention’ directive, the committee had to show that it could also be an effective and ‘responsible’ actor capable of working for a common inter-institutional interest if necessary. By doing so, it ensured that “more co-decision would come their way”³⁷⁰.

In conclusion, all three cases show (albeit to differing degrees) the importance of ‘institutional patriotism’ in driving the change of the EP’s policy preferences. When faced with a misfit between the necessary procedural behaviour and its traditional policy preferences, the willingness of most EP actors to ensure an increased presence of the EP in inter-institutional negotiations led to the abandonment of the latter. As will be shown below, this tendency to prioritise institutional interests is especially noticeable among those internal actors that have the most to gain or those that usually hold an ‘institutionalist’ role in the EP (Bale & Taggart 2006).

8.2.2. Micro-level: Endogenous driving forces

Processes of institutional adaptation are usually driven either by endogenous (internal) actors or by exogenous (external) actors. Some have noted that adaptation driven by exogenous actors often encounters more resistances and is less successful than if it is driven by endogenous actors (Acharya 2004; Björkdahl 2006; Cortell & Davis 2000, 74). As seen above, change seems to be also more successful if it is promoted by endogenous actors, especially those inside the LIBE committee. The existence of endogenous change entrepreneurs facilitates the process of adaptation and the internalisation of the new patterns of behaviour.

³⁷⁰ ALDE political advisor B, interview, March 2011.

The willingness of certain endogenous actors to change the preferences of the EP is clear both in SWIFT and the 'Returns' directive. In the latter case, the pressure to demonstrate their ability to be effective in inter-institutional negotiations under co-decision led some specific actors to request a change of behaviour from the other members in the LIBE committee. The most active (and conscious) entrepreneur was the EPP-ED group, which had the most to gain from co-decision. The conservative group had been a clear outsider under consultation; its views seen as too 'radical' and too close to the Council's preferences for the rest of the committee. Therefore, the consensual behaviour required under co-decision and the ensuing change in the policy preferences of the EP benefited the EPP-ED group, since it gave it more chances to be at the core of compromises. Consequently, the EPP-ED engaged in a process of discursive entrepreneurship. Its aim was to lead the change from inside the committee in order to make sure that the amount of co-decision files would increase, which would give a better chance to the conservatives to participate and to become a more relevant actor in the long-term.

ALDE – the main loser in the 'Data retention' directive – also became a (probably more accidental) change entrepreneur. Its willingness to be part of the agreement resided in the groups' size; being a smaller political group, ALDE feared that showing reluctance to compromise would exclude it from coalition-building in the long-term. The group was concerned that, left to their own devices, the two largest groups would avoid having to include smaller groups in the process of coalition-building. This would only help to reinforce the tradition to form a 'grand coalition' (Kreppel & Hix 2003) that would systematically exclude them from decision-making. This argument was used both in the 'Returns' directive and during the re-negotiations of SWIFT. On both occasions, the fear to be excluded converted ALDE in an unexpected discursive entrepreneur.

In general, it is also clear that, on those occasions where the process was led by endogenous forces ('Returns' and SWIFT), change was more easily embraced and legitimised than when it had been imposed by external actors. More importantly, when the process was conducted by endogenous agents, the new norms of behaviour were more easily accepted and internalised in the longer term. This made it easier to sustain the changes and present them as the new 'mainstream' behaviour. With this in mind, the 'Returns' directive proved to be the main turning point in the process of adaptation. After the 'Returns' directive, there was a clear acceptance that co-decision required a more

consensual behaviour and less radical positions than consultation. These new understandings were seemingly internalised, since this differentiation appears increasingly in the vocabulary of actors, who now refer to co-decision as 'legislative' dossiers, while consultation or own initiative reports are referred to as 'political' files³⁷¹. The use of this language gives the impression that the committee had abandoned any expectations of political confrontations with the Council under co-decision.

Conclusion

This chapter has assessed the three previous empirical case studies in order to find common patterns that can be used to explain institutional change. The chapter has sought to identify and classify the conditions for change; it has also isolated the broader driving forces behind institutional change. In order to clarify the different levels of change, the conditions and driving forces have been divided into two different levels: a macro-structural level looking at procedural and substantive layers and a second level focusing on the micro-behaviour of actors.

The examination of the case studies has identified five different categories of conditions that explain the presence and extent of change as well as the different dimensions where this process of adaptation occurs. The first three categories respond to macro-structural forces. The first category looked at the procedural dimension and examined the pressure that changes in the decision-making rules put on the expected patterns of behaviour of EP actors. In this sense, procedural uncertainty and timing were essential to increase the pressure on actors, since it opened grey areas and offered more opportunities to reinterpret the rules of the game. A change in procedures offers the ideal conditions to question the existing patterns of behaviour. In this sense, the comparison has shown that the amount of time between the change of procedures and the reinterpretation of the rules is also important. Those cases that occurred just after the introduction of new decision-making rules offered more and better opportunities to redraw procedures in a short space of time. This period of great uncertainty put more pressure on EP actors to question past patterns of behaviour and change these patterns in order to make them fit better into the new institutional context.

³⁷¹ ALDE political advisor A, interview, March 2011.

The second category concentrated on the substantive dimension and emphasised the importance of mobilising existing rationales (especially discourses on securitisation in the context of the AFSJ) to trigger change and legitimise the necessity to adapt. In this case, the long-term rationale of this area (securitisation) helped to reinforce the gap between the traditional policy preferences of the EP and the discourses used at the domestic and EU level to legitimise internal security measures. Discourses that appealed to the security of citizens and the necessity to protect them from potential terrorist attacks proved stronger and electorally more profitable than those discourses that insisted on the necessity to ensure high levels of data protection. In a similar way, it was difficult to argue for more rights for migrants due to low electoral reward of such arguments. Despite the high and lows in the process of securitisation (which affected the level of urgency during negotiations), this rationale proved to be resilient and therefore an effective source of pressure that enhanced the necessity to change the policy preferences of the EP.

The last macro-structural condition crossed the two previous conditions, which showed that it was a necessary element for change. The three case studies showed that if institutional interests and policy preferences do not fit, the frictions that derive from this misfit will be a certain trigger of institutional adaptation. In this case, either the procedures will have to change or the policy preferences will have to be sacrificed. However, it is important to note that nothing in this condition determined the direction of change *per se*. The presence of misfit triggered change, but it did not point towards either a change in the procedural dimension or towards a change in the substantive dimension. Therefore, it is particularly interesting to see that (in all three cases) change took the route of the substantive dimension and pushed for an adaptation of the EP's policy preferences. This shows that there was a wider driving force shaping the 'directionality' of change.

The other two categories referred to the micro-behaviour of actors. The first category focused on the actions of single actors and examined how individual decisions can facilitate or hinder change. In order to render the dynamics of change clearer and easier to identify, this category was split into two different conditions, which examined endogenous and exogenous agents of change. In terms of endogenous agents, the comparison of the case studies revealed the importance of some key roles, especially that of rapporteurs and shadow rapporteurs. The ideology and personality of negotiators could prove essential for the success or failure of a specific file and for triggering or hindering

adaptation. Similarly, external actors could put pressure and force change or they may have simply supported and amplified an initiative already started by endogenous actors. The last condition looks at the importance of stable patterns of coalition building. The uncertainty surrounding the composition of coalitions in the last two parliamentary terms reinforced the importance of first-reading deals and the necessity to find compromise among different EP groups. This requirement put special pressure on those groups that were usually at the core of coalitions, namely the EPP, the socialist group and ALDE.

The comparison of the conditions also reveals the presence of common driving forces that serve to trigger and legitimise change. First of all, all three cases underline the importance of a shared principle of ‘institutional patriotism’ among EP actors. This principle explains the constant efforts of the EP to increase its influence in EU inter-institutional relations. From its inception, the EP has mostly strived to become more effective and influential in the institutional triangle, ensuring, for instance, that it plays an important role in budgetary debates or in the choice of the Commission’s cabinet. Therefore, ‘institutional patriotism’ served as the main driving force and legitimising rationale for change. It solved the conundrum raised by the misfit between institutional and policy preferences; it prioritised the extension of EP influence in inter-institutional relations at the expense of its traditional policy preferences in the AFSJ.

It is also significant that ‘institutional patriotism’ was a more effective driving force in those cases where the institutional change was recent and thus more open to informal interpretations than in cases where these new understandings had become more settled. For instance, in the case of ‘Returns’, ‘institutional patriotism’ served as a long-term rationale for change, yet the time elapsed since the change of procedures allowed for fewer informal changes than in the other two cases. More importantly, the principle of ‘institutional patriotism’ underlines that the pressure to become more ‘responsible’ in order to be effective in inter-institutional negotiations was not a mere mechanical reaction to co-decision. The choice made in favour of ‘responsibility’ was not just a knee-jerk reaction to the patterns of behaviour required under co-decision; it was driven by a long-term institutional rationale that permeated the actions and decisions of the EP. If the transformative power of this driving force is not sufficiently recognised, it would be impossible to understand the behaviour of the EP during the SWIFT negotiations, in which it insisted on expanding its influence from the earliest stages, even at the expense of its

traditional policy preferences on data protection, which had served to build the character of LIBE.

Finally, the comparison of the case studies also revealed another driving force, this time focusing on endogenous pressures for change. The failure of the 'Data retention' directive and the first SWIFT agreement showed that attempts to force adaptation upon the LIBE committee may have been successful but that they did not favour the internalisation of change. This shows that if change is promoted by endogenous agents that convince the rest of the members of the necessity to adapt, internalisation will be more probable and changes will have a lasting effect. The probabilities to internalise change are especially high if external actors support and amplify this discourse, instead of trying to impose their own interests on the EP.

Chapter 9: Conclusions

This research project set out to solve a puzzle: how is it possible that despite its long-standing defence of human rights and civil liberties, and despite being now a co-legislator, the EP has proved unwilling to change the direction of internal security policies? The end of the transitional period in 2005 raised high expectations regarding the potential for transforming the Area of Freedom, Security and Justice into a more democratic and, especially, less security-oriented policy field. However, the efforts to widen the debate and to underline the need for a better balance between security and liberty seemed to pay lip service to its past battles in the AFSJ but, generally, they did not translate into tangible rights and protections. As a consequence, the legislative outcomes of these last few years have not fulfilled the expectations raised by the extension of co-decision.

In order to solve this puzzle, this study has focused on the introduction of new decision-making rules in the AFSJ, which has made it easier to understand the change in the EP's policy preferences and its behaviour in inter-institutional relations. Given the focus on institutions, the analysis has drawn from two 'new institutionalist' approaches – rational-choice and constructivism; the adding together of two antithetical approaches has helped to maximise the number of explanations and unveil the different layers of change. In this sense, the empirical analysis leads to three sets of findings: on the nature of the AFSJ; on the present and future evolution of the EP; and on some theoretical considerations on issues of ontology and change.

The study has presented the case studies of three legislative texts that caused surprise for their restrictive approaches to internal security matters. The 'Data retention' directive allowed national authorities to store data from all EU citizens for law enforcement purposes – whether they were suspected of having committed a crime or not. In this sense, the directive contradicted the high data protection standards advocated by the EP in the past. The outcome was especially surprising because the directive was identified as the first occasion in which the EP could act as a co-legislator in issues related to counter-terrorism. It was also surprising because socialists and conservatives decided to by-pass the LIBE committee in order to find a compromise with the Council. The leaders of the EP

considered that the behaviour of the committee was not suitable under co-decision since it put at risk the position of the EP as a co-legislator in the AFSJ.

Three years after, the 'Returns' directive also raised disapproval for facilitating the expulsion and detention of migrants staying irregularly on the territory of member states. Negotiations were fraught with difficulties and spanned over a period of three years. Within the LIBE committee, coalitions fluctuated constantly. There, the uncertain positioning of the socialist group increased the pressure on the smaller groups and made it more difficult for them to decide whether they were in favour or against the compromise. In the end, the liberal group (ALDE) decided to support the conservative groups and voted in favour of a directive that was far removed from its original preferences.

The last case study looked at another decision-making procedure in order to compare it with co-decision. The SWIFT Agreement raised high expectations because it was the first agreement to be consented to by the EP after the Treaty of Lisbon. On 11 February 2010, the EP made use of its power of consent and rejected the Agreement, justifying its decision on the basis of its traditional policy preferences in favour of high data protection standards. However, it eventually accepted and ratified a similar version of the Agreement in July 2010, which means that its policy preferences shifted quite substantially in the space of only five months. During the period of re-negotiation, the EP insisted that it should be included in discussions from the earliest stages and, by doing so, it transformed the consent procedure into a *quasi*-co-decision. This shift raised the same pressure to behave 'responsibly' that had appeared after the shift to co-decision. The necessity to be flexible in order to find a compromise justified the formation of an oversized coalition that excluded only the Greens and the radical left.

The comparison of the three case studies highlighted five different conditions that facilitated the inception and internalisation of change at the macro and micro level. In this sense, the macro level showed how the procedural uncertainty left by recent institutional reforms opened a window of opportunity to redefine the patterns of behaviour required under each procedure. At the same time, these processes of redefinition were often facilitated by the salience of securitisation discourses, which imbued the situation with an additional layer of urgency. Finally, the three case studies showed that a misfit between institutional and policy preferences was necessary to trigger change. In all the cases, the traditional behaviour of LIBE entered into conflict with the consensual patterns of

behaviour required under co-decision (or a modified consent procedure). This misfit revealed the importance of the principle of 'institutional patriotism' as the main driving force behind the change of policy preferences. It was the importance accorded to the powers of the EP that justified the priority accorded to institutional preferences over the traditional preferences of the EP in the AFSJ.

The examination of the conditions for change also emphasised the role of micro-structures in the process of adaptation. The role of specific actors as discursive entrepreneurs was essential to initiate and shape the direction of change. Equally, the composition of the EP had considerable effects for coalition-building and especially for the behaviour of specific groups; their position inside LIBE rendered them more or less resilient to change. In this sense, the unstable patterns of coalition formation in the current EP allowed certain groups to shift their position and to put pressure on other groups so that they would abandon their confrontational behaviour. These dynamics show that another important driver of change is the presence of endogenous agents of change triggering adaptation from inside the committee – as well as the support given by external actors to the efforts of these entrepreneurs.

In general, the empirical analysis shows that the unfulfilled expectations raised by the transformation of the EP into a co-legislator reflect the resilience of the substantive dimension of the AFSJ. Despite major changes in the structure and the actors involved in the policy-making of internal security matters, this area continues to be dominated by a security rationale. The process of securitisation started during the intergovernmental period has not been revisited after the gradual supranationalisation of the AFSJ. The major procedural modifications introduced in the Treaty of Amsterdam and, especially, in the Treaty of Lisbon have not been translated into a wider debate on the nature of this policy area; clearly, there has not been a U-turn in the objectives of the AFSJ. On the contrary, the process of securitisation continues and, in some occasions, it could potentially have negative implications for the objectives set by the Treaties. For instance, the recent influx of migrants from the unsettled North-African countries casts doubts on the Schengen project, reintroducing border controls inside the EU territory.

Does this lack of change in the substantive dimension of the AFSJ mean that the EP is now operating as a securitising actor? The answer to the question is not clear-cut. On the one hand, the EP is certainly not promoting a security rationale. As seen in the three case

studies, there are no clear examples of amendments introduced by the EP aiming to reinforce the levels of control. On numerous occasions, the EP still acts as an advocate for higher levels of proportionality and protection. On the other hand, the EP has ceased to contest the security rationale driving most of the initiatives proposed in this area. In most recent decisions, it may have challenged the proportionality of the measures proposed, but it has never seriously questioned their necessity. As the debates around the Stockholm Programme showed (European Parliament 2009d), the EP seemed more interested in debating issues of solidarity and burden-sharing than forcing a U-turn in the direction of the AFSJ. Even if one cannot say that the EP has turned into a securitising actor, it is clear that it cannot be described any longer as an 'institutionalised NGO'.

The absence of debate around the security rationale of this policy area has clear normative implications. The increase in EP powers after 2005 raised high expectations because it was assumed that the EP was the last 'mainstream' institution that offered some potential for de-securitising the AFSJ. The long-term confrontational behaviour of the EP (and especially LIBE) led to expect an in-depth reconsideration of the necessity and legitimacy of internal security policies. The change in the behaviour of the EP – namely its reticence to question the rationale of this area – raises doubts on the potential for changing the course of the AFSJ in the near future. Even if previous measures are revised, it seems improbable that their existence will be questioned. For instance, the EP has asked the Commission to be ambitious in its review of the 'Data retention' directive, especially in relation to data protection (European Parliament 2011b, 53). However, the EP has not gone as far as the EDPS, who "called for a clear demonstration that such a measure is necessary and proportionate" (European Data Protection Supervisor 2011). The EP might be ready to reconsider the proportionality of certain measures but it does not seem interested in questioning their necessity.

With the EP now participating in the game, it is difficult to see another source of contestation that has enough influence in the EU decision-making process to raise such essential questions. In the absence of a discordant note inside the EU institutional triangle, the security rationale might become 'normalised' and legitimised on the grounds of being necessary for the protection of EU citizens (Boin et al. 2006). As a result, the necessity to raise the levels of security might be less and less questioned by EU citizens, who might come to perceive these levels of security not as an exceptional measure but as the

‘adequate’ or the ‘normal’ level of security. The ‘normalisation’ of high levels of security can have serious implications. For EU citizens, it could translate into a trivialisation of controls and a change in the conception of civil liberties and personal privacy. Small instances such as the control of liquids or the imminent introduction of body scanners at the airports (European Parliament 2011a) are an example of interferences that become accepted by citizens. However, it can prove even more difficult to contest the securitisation of borders and migrants. As seen in the different case studies, there is a significant difference between those issues that touch directly upon the rights of EU citizens and those that do not. In this sense, the lack of resonance at the domestic level of policies affecting the rights of TCNs and the absence of direct implications for EU citizens renders debates on borders and migration even more secluded from contestation than those on data protection or counter-terrorism. Without the support of the EP, it can prove more difficult to undo the link between security and migration.

These normative implications lead us to interrogate the motivations behind the change in the policy preferences of the EP. Why would the EP cease to advocate high standards of civil liberties and human rights protection precisely now that it could make a difference to policy outcomes? This question touches upon the question of how ‘normal’ the EP is in practice. Despite the generalised claims that the EP has become “part of the European political ‘establishment’” (Maurer 2007, 18) and that it is now a ‘normal’ parliament (Goetze & Rittberger 2010; Hix et al. 2003), the examination of the three case studies raises some questions about the motivations that drive the change in its policy preferences. The comparative analysis has shown that the ‘institutional patriotism’ of the EP is a crucial factor driving decisions in the EP. In practice, the presence of an ‘institutional patriotism’ means that the ‘normalisation’ of the EP is more formal than actual. Certainly, the EP behaves now like a ‘normal’ parliament, with party competition determining the outcomes of negotiations and guiding inter-institutional relations in a bicameral system (Costello 2011; Hagemann & Høyland 2010). However, a closer examination shows that when there is a choice to be made between policy preferences and institutional preferences, the old habits kick in and the pursuit of more power and influence becomes a more important objective. When faced with a choice between institutional and policy preferences, the EP does not hesitate to sacrifice the content of these policies in order to increase its own power.

The examination of the case studies has also shown that, under co-decision, the pursuit of more influence inside the EU institutional structure does not take the form of confrontation or advocacy. In a bicameral system, the EP is in a symbiotic relationship with the Council. It needs to find compromises with its co-legislator, which requires internal and inter-institutional consensus; at the same time, it also has to share the success or blame of the policy outputs. Before 2005, the bases for this symbiotic relationship did not exist in the AFSJ; EP and Council stood at opposite poles and were locked in a cycle of mistrust and confrontation built over the years. Once co-decision became a daily practice, a new working culture that resonated with the culture of consensus had to be created.

At this point, the Council pre-empted any attempts of the EP to continue its practices of confrontation – since these might have forced the members in the Council to re-examine the rationale of the AFSJ. It appealed to the ‘institutional patriotism’ of the EP by designating the institution as ‘immature’, considering that it still had to learn the rules of the game and the adequate behaviour to function under co-decision. In this sense, the EP was subjected to a learning process, in which it had to be taught how to behave ‘responsibly’, i.e. assume the consequences for its actions and learn to find ‘pragmatic’ solutions that could be agreeable to member states. The successful appeal to the ‘institutional patriotism’ of the EP explains why it was the latter that felt in need of becoming closer to the policy preferences of the Council, and not the other way round (or not to the same extent).

As a result, the EP has now integrated this idea of ‘responsibility’ as a norm guiding its behaviour and as a legitimising rationale for the change of its policy preferences. This new norm of behaviour has important implications for the democratic credentials of the EP, not just in the ASFJ but in any policy area where co-decision (and maybe consent in the future) applies. In practice, the norm of ‘responsibility’ increases the pressure on the EP to conform and avoid wider debates and discussions on the principles underpinning new legislative proposals. Despite, in theory, being a forum in which to discuss policy alternatives, the EP seems to dismiss the most extreme proposals at the earliest stages of negotiations because it considers that they are not prone to compromise. In this sense, the norm of ‘responsibility’ appeals to the functional tension between democracy and efficiency, already raised by Shackleton and Raunio (2003) when examining other areas under co-decision. In effect, this means that there is a growing contradiction

between the 'responsibility' of the EP as a co-legislator, which leads to dwindling debates in the name of consensus, and the 'responsibility' that the EP has towards EU citizens in its representative role.

This tension is also present in the numerous informal practices that have now become almost formalised under co-decision. The pressure to find a viable compromise between Council and EP leads to an increase in the number of early agreements (before the first reading stage) and the use of trialogues. These practices strengthen the role of specific actors but also create invisible lines of inclusion and exclusion, which put a particular strain on some groups. On the one hand, some groups have clearly changed their position inside the EP, and especially inside the LIBE committee. For instance, the EPP has now become the new 'insider' in the AFSJ; its proximity to the positions of the Council and the central position as the EP's largest group have made it easier for the group to leave the outer zones of the LIBE committee and speak with a more authoritative voice. In comparison, the groups on the left (especially the radical left) have become the new outsiders; considered too inflexible and idealistic for the new game.

On the other hand, those at the centre of the spectrum are finding it more difficult to define their roles and strategies. The socialists often struggle to maintain the cohesion of the group due to the internal disagreements between its national delegations; some delegations (especially those whose national party sits in the Council) have more readily accepted the new norm of 'responsibility' (and even the prevailing security rationale) than those who wish to maintain a more confrontational behaviour. It is, however, the liberals who face major difficulties in the new environment. Contrary to the assumptions of some studies based on roll-call votes and focusing on voting behaviour (Votewatch 2010b), ALDE is not the new 'king-maker' but rather the 'squeezed middle'. Their size and position is often a burden rather than a source of strength. In practice, being in the middle does not translate into being able to choose between conservatives and socialists when building coalitions; it means being forced to go with one or the other. For the sake of not being left out of the game, the liberals usually have to accept forming coalitions with one of the large groups and thereby agree to compromises that are far away from their preferred policies. This situation is especially challenging when the liberals are in key positions, such as in the role of rapporteurs; in that position, they often have to sacrifice their rights-based preferences in order to secure the support of one of the largest groups. Therefore, the

position of ALDE as the 'squeezed middle' highlights the difficulties of the group to find a balance between remaining an 'insider' and keeping its reputation as an advocate of civil rights.

These dynamics of inclusion and exclusion give a new twist to the 'technical vs. political' debate (Fouilleux et al. 2005; Winzen 2011). Under these new conditions, those groups that feel excluded are forced to accept policies with which they do not feel at ease. By doing so, they are reviving the old confrontational patterns developed under consultation, only now using non-legislative activities such as oral questions or own initiative reports. These strategies seem to escape the weight of the norm of 'responsibility' developed under co-decision and consent. As a result, a new division has emerged between 'legislative' and 'political' debates; a juxtaposition that seems to equate the legislative process to a technical domain (i.e. characterised by its apolitical nature) and that reserves the character of 'political' to those domains where the EP has no actual power. Certainly, this was also the case under consultation; however, those policy areas where consultation applied aspired to be transferred to co-decision at some point in the future. In comparison, own initiative reports and oral questions cut across procedures; the debates held on these occasions are purely declarative. This means that political debates are removed from the legislative domain and reserved for symbolic occasions, which bear no real influence in the EU decision-making process.

This dynamic of depoliticisation is especially problematic given the structure of the EP. As the theoretical and empirical analyses have shown, decision-making in the EP is heavily dependent on parliamentary committees. LIBE is not just an organisational structure where policy alternatives are debated; it is the core of the political process, embedded in a particular culture and dynamics. Its previous position as an outlier allowed it to develop its own norms and patterns of behaviour, which imbued it with an aura of credibility and legitimacy. Despite the adaptation to the norms of co-decision, this particular culture is still beneath the surface and shapes the understandings of policy debates and institutional relations. This explains why actors inside LIBE need to find a way to release the pressure and revive this past reputation. In consequence, oral questions and own initiative reports offer this opportunity to escape from the weight of consensus, even if these actions remain purely symbolic.

This dynamic consolidates the gap between political and legislative spheres of decision-making and the distinct policy preferences adopted in each. If legislative processes are seen as technical and consensual, then there is a risk that legislative debates will become more enclosed inside the structure of the committee. As a result, these processes could become less transparent and difficult to follow, since the committee structure in the EP reinforces the insulation of decision-making. If the legislative sphere is considered as a technical area that should be left to experts, the emphasis on compromise (which leads to informal practices such as trialogues) can only be strengthened. The role of committees as informational resources – where MEPs can specialise and become experts (Ringe 2009) – facilitate this trend. This questions the extent of transparency and democracy in the EP and the necessity to open committees to more scrutiny as well as to regulate the extent of informal practices. Without more oversight over the activities of committees, it may prove very difficult to know who decides what in the EP.

The previous findings also highlight the relevance of a research design using different institutionalist approaches to maximise the number and nature of explanations. This type of design, combined with an interpretivist epistemology, offers two advantages. First, it avoids the pitfalls of competitive research designs, which often fall into the first-mover trap (Jupille et al. 2003, 27-28); namely, it reduces the bias created by introducing the preferred approach in the first place, which often leads to a less favourable comparison of the second approach. An approach that focuses on the levels of analysis reduces the tension between the two theoretical approaches, letting them speak with the same degree of authority. The second advantage is that, by bracketing off the question of epistemology and keeping the explanations separate, one can avoid the problems of incommensurability. Accepting that different approaches can provide alternative understandings of social phenomena offers the possibility to let several perspectives come together and offer parallel accounts of the same phenomenon. This is why it is important to identify the different levels of analysis, so that the two approaches can speak to each other and complement the respective explanations.

However, this logic does not exclude the possibility of providing a judgement on the validity of the different explanations offered by the two theoretical approaches. The empirical analysis has shown that rational-choice institutionalism is better suited to explain the micro level, emphasising a logic of action based on 'consequentiality' and strategic

action. On the other hand, constructivist approaches to institutionalism put the accent on the macro level, focusing on normative contexts and legitimising dynamics. At the same time, the use of a logic underlining the different levels of analysis has helped to bring agency back into institutionalism (Checkel 1999). The emphasis on the micro level has demonstrated the importance of individual actors in shaping decisions and outcomes. The choice of a particular rapporteur or the presence of a given minister can alter the course of negotiations; render some compromises easier or bias the process of coalition-building. However, these choices are not made in a vacuum; the viability of certain coalitions or the capacity to present a compromise as a legitimate solution show the presence of wider driving forces that have been constructed in a specific institutional, social, and political context. Therefore, the focus put on the levels of analysis makes it easier to identify the links between structure and agency.

The identification of different levels of analysis is also essential in order to determine the elements of change. The use of two theoretical approaches has helped to pinpoint the layers in which change materialises. The frictions and synergies between their alternative explanations have underlined the existence of different layers of change inside each level (micro and macro). In this sense, both institutionalist approaches have looked at two dimensions of change. In a first layer of change, formal and informal processes converge to produce change in the policy preferences of the EP by offering an understanding of the rules of the game and shaping the patterns of behaviour. In this sense, this layer determines the level of influence that specific actors enjoy in decision-making as well as their capacity to produce legitimate discourses, which are essential to trigger change in the policy preferences of the EP. The more a specific actor is granted power by formal rules and informal practices, the easier it will be to be effective as a discursive entrepreneur.

The second layer emphasises the substantive and procedural dimensions of change. As seen above, tensions between the substantive understandings of a policy issue on the one hand, and the procedural driving forces that legitimise institutional action on the other hand, can also trigger a process of change in the policy preferences. In this sense, the analysis of the empirical cases reinforces the primacy of the 'logic of appropriateness' over the 'logic of consequentiality' (see also Müller 2004). Strategic choices aiming to maximise one's preferences can only be legitimised if they fit within a wider normative setting that

defines the formal and informal patterns of behaviour as well as the substantive and procedural dimensions appropriate to the EU context. Any attempt to modify the EP policy preferences by altering the composition of coalitions will have to be effectuated taking into account the wider context, composed of specific procedural and substantive 'meta-norms'.

Ultimately, both rational-choice and constructivist approaches to institutional and policy preference change point towards the same 'directionality' of adaptation. Despite the tensions between formal and informal layers as well as between substantive and procedural dimensions, the micro-behaviour of the actors and the normative context at the macro level coincide in emphasising the necessity to modify the traditional preferences of the EP. The EP had to abandon its preference for higher standards of protection in internal security matters for the sake of coalition-building and to portray itself as being more institutionally 'responsible'. Now that policy and institutional preferences have been aligned, it is difficult to envisage a radical U-turn in the position of the EP in the AFSJ. In this sense, only an important new factor that would alter either the substantive or the procedural dimension could trigger a new cycle of change. Despite having nuanced the discourses and required a closer examination of the proportionality offered by internal security tools, the EP is, for the time being, probably going to remain, on balance, another piece in the EU machinery working to ensure that security remains the main objective of the Area of Freedom, Security and Justice.

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- ❖ Albrecht, Jan Philipp, MEP (Greens/EFA, German), 24.03.2010
- ❖ Alliance of Liberals and Democrats for Europe (ALDE), Political advisor A, 31.03.2011
- ❖ Alliance of Liberals and Democrats for Europe (ALDE), Political advisor B, 31.03.2011
- ❖ Alvaro, Alexander, MEP (ALDE, German), 22.01.2009; 15.07.2010
- ❖ Busuttil, Simon, MEP (EPP, Maltese), 23.03.2010
- ❖ Council of the European Union, Official A, 22.01.2009
- ❖ Council of the European Union, Official B, 29.01.2009
- ❖ Council of the European Union, Official C, 29.01.2009
- ❖ European Commission, Official A, 30.01.2009
- ❖ European Commission, Official B, 30.01.2009; 07.04.2011
- ❖ European Commission, Official C, 30.01.2009; 01.04.2011
- ❖ European Commission, Official D, 26.03.2010
- ❖ European Commission, Official E, 26.03.2010
- ❖ European Commission, Official F, 08.07.2010
- ❖ European Commission, Official G, 08.07.2010
- ❖ European Commission, Official H, 05.04.2011
- ❖ European Parliament, MEP, 13.07.2010
- ❖ European Parliament, MEP assistant A, 30.11.2009
- ❖ European Parliament, MEP assistant B, 23.03.2010
- ❖ European Parliament, Official A, 29.01.2009
- ❖ European Parliament, Official B, 26.03.2010
- ❖ European People's Party (EPP), Staff, 28.03.2011
- ❖ European Union, Official, 22.03.2010; 09.07.2010
- ❖ European United Left/Nordic Green Left (GUE/NGL), Political advisor A, 28.03.2011
- ❖ European United Left/Nordic Green Left (GUE/NGL), Political advisor B, 29.03.2011
- ❖ Group of the Progressive Alliance of Socialists & Democrats (S&D), Political advisor, 29.03.2011
- ❖ Lemarchal, Annie, PES Political advisor, 24.03.2010

- ❖ Permanent Representation, Diplomatic source A, 25.03.2010; 06.07.2010
- ❖ Permanent Representation, Diplomatic source B, 08.07.2010
- ❖ Sidenius, Christine (Greens /EFA), Political advisor, 30.03.2011
- ❖ Speiser, Michael (EPP-ED), Political advisor, 22.01.2009

Phone interviews:

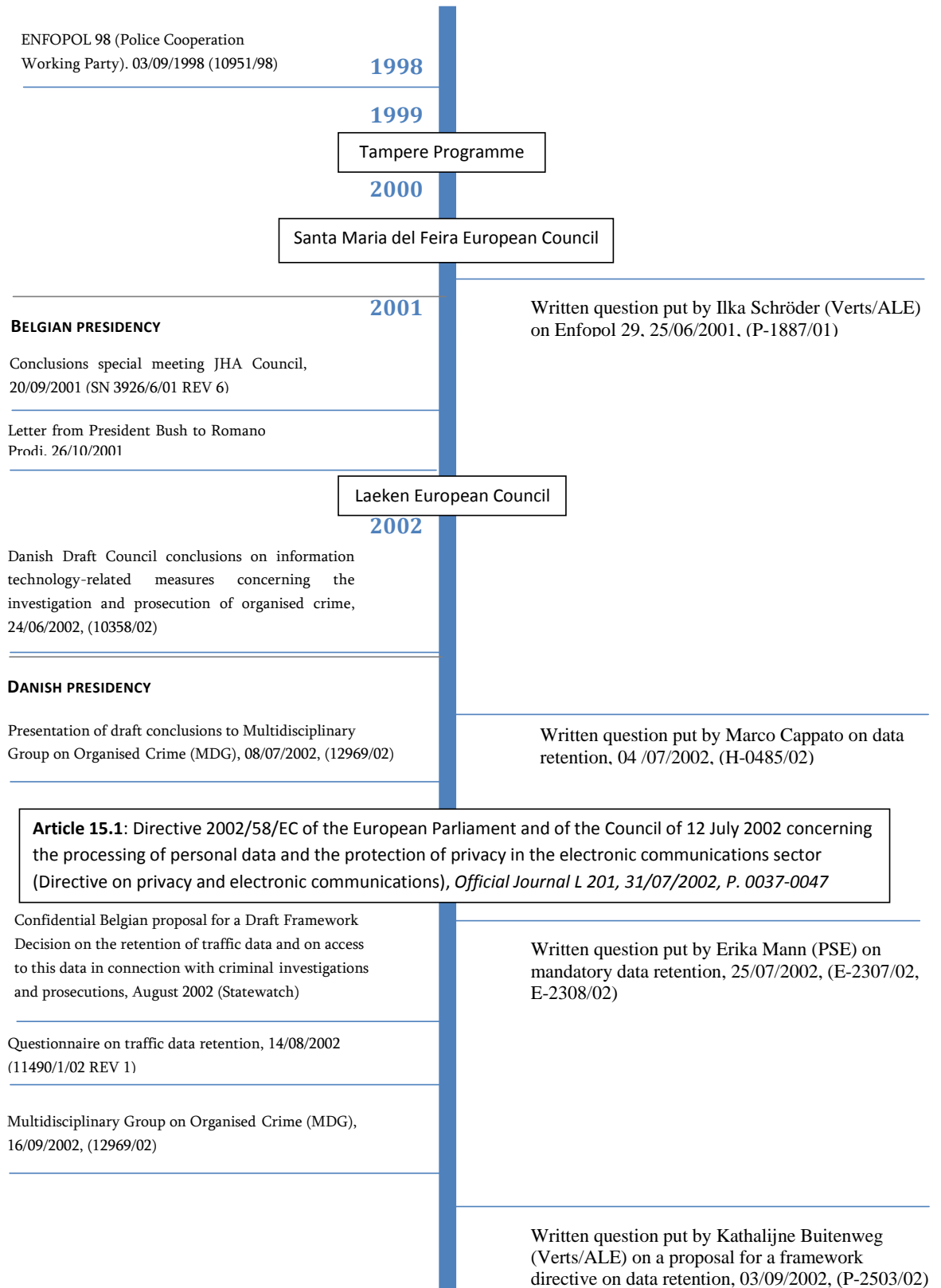
- ❖ Hennis-Plasschaert, Jeanine, MEP (ALDE, Dutch), 17.03.2010
- ❖ Weber, Manfred, MEP (EPP-ED, German), 03.12.2009

Communications:

- ❖ European Parliament, Official A, 22.03.2010
- ❖ In 't Veld, Sophie, MEP (ALDE, Dutch), Intervention at the THESEUS Seminar for Young Leaders 2010, Brussels, 12.07.2010

Appendices:

Appendix 1: Time-line of the 'Data retention' directive



Multidisciplinary Group on Organised Crime (MDG),
16/10/2002, (14923/02)

2004

IRISH PRESIDENCY

European Council, "Declaration on combating terrorism",
25/03/2004, (7906/04)

Written question put by Charlotte Cederschiöld
(EPP-ED) to the COM on data retention,
24/10/2002, (H-0692/02)

Written question put by Erik Meijer (GUE/NGL) to
the COM on US and data retention, 28/10/2002, (E-
3081/02)

French Republic, Ireland, the Kingdom of Sweden and the United Kingdom's Draft Framework Decision
on the retention of data processed and stored in connection with the provision of publicly available
electronic communications services or data on public communications networks for the purpose of
prevention, investigation, detection and prosecution of crime and criminal offences including terrorism,
28/04/2004, (8958/04)

DUTCH PRESIDENCY

Commission Forum for the prevention of organised crime -
ad hoc meeting on data retention, 14/06/2004, (10841/04)

Questionnaire on traffic data retention, 25/06/2004
(10767/04)

Working Party on cooperation in criminal matters,
04/06/2004, (10841/04)

Commission workshop on traffic data retention,
21/09/2004, (13353/04)

Working Party on cooperation in criminal matters, 27-
28/09/2004, (13353/04)

Article 36 Committee (CATS), 7-8/10/2004, (13353/04)

Written question put by Edith Mastenbroek (PSE) to
the COM on third pillar proposal on data retention,
27/09/2004, (P-2278/04)

Working Party on cooperation in criminal matters, 19-
20/10/2004, (14190/04)

Written question put by Edith Mastenbroek (PSE) on
third pillar proposal on data retention, 01/10/2004,
(H-0323/04)

Council invites the EP to submit an opinion by the end of
February 2005 (CATS), 19/10/2004, (13227/04)

Article 36 Committee (CATS), 11-12/11/2004, (13227/04)

JHA Council meeting, 02/12/2004 (15556/04)

Alexander Alvaro appointed LIBE rapporteur for
third pillar Framework Decision (25/11/2004)

The Hague Programme

LUXEMBOURGISH PRESIDENCY

2005

Angelika Niebler appointed ITRE co-rapporteur for third pillar Framework Decision (27/01/2005)

Commission's position as to the legal bases (26/01/2005)

Article 36 Committee (CATS), 07/02/2005, (6566/05)

Working Party on cooperation in criminal matters, 17-18/02/2005, (6566/05)

Framework Decision discussed in LIBE, (31/01 - 01/02/2005)

Oral question put by Alvaro (ALDE Group), Buitenweg (Verts/ALE Group), Reul (EPP-DE Group) on the legal basis of data retention; Oral question put by Alvaro (ALDE Group) to the COM on data retention, 17/02/2005. (O-0013/05. O-0014/05)

Oral question put by Buitenweg, on behalf of the Verts/ALE Group to the COM on data retention and data protection, 25/02/2005, (O-0017/05)

Article 36 Committee (CATS), 28/02/2005, (7833/05)

Oral question put by Klamt, Cederschiöld, Reul and Coelho, on behalf of the EPP-DE Group on data retention, 01/03/2005, (O-0019/05)

Working Party on cooperation in criminal matters, 8-9/03/2005, (7833/05)

Oral question put by Catania and Kaufmann, on behalf of the GUE/NGL Group to the COM on data retention, 02/03/2005, (O-0023/05)

Oral question put by Alvaro, on behalf of the ALDE Group on data retention, 07/03/2005, (B6/2005)

Commission's legal opinion (22/03/2005), SEC(2005)420

Council legal service, opinion on legal basis, 05/04/2005, (7688/05)

Working Party on cooperation in criminal matters, 18-19/04/2005, (8356/05)

Draft report on Framework Decision, 18/04/2005, (PE357.618)

Article 36 Committee (CATS). 10/05/2005. (8864/05)

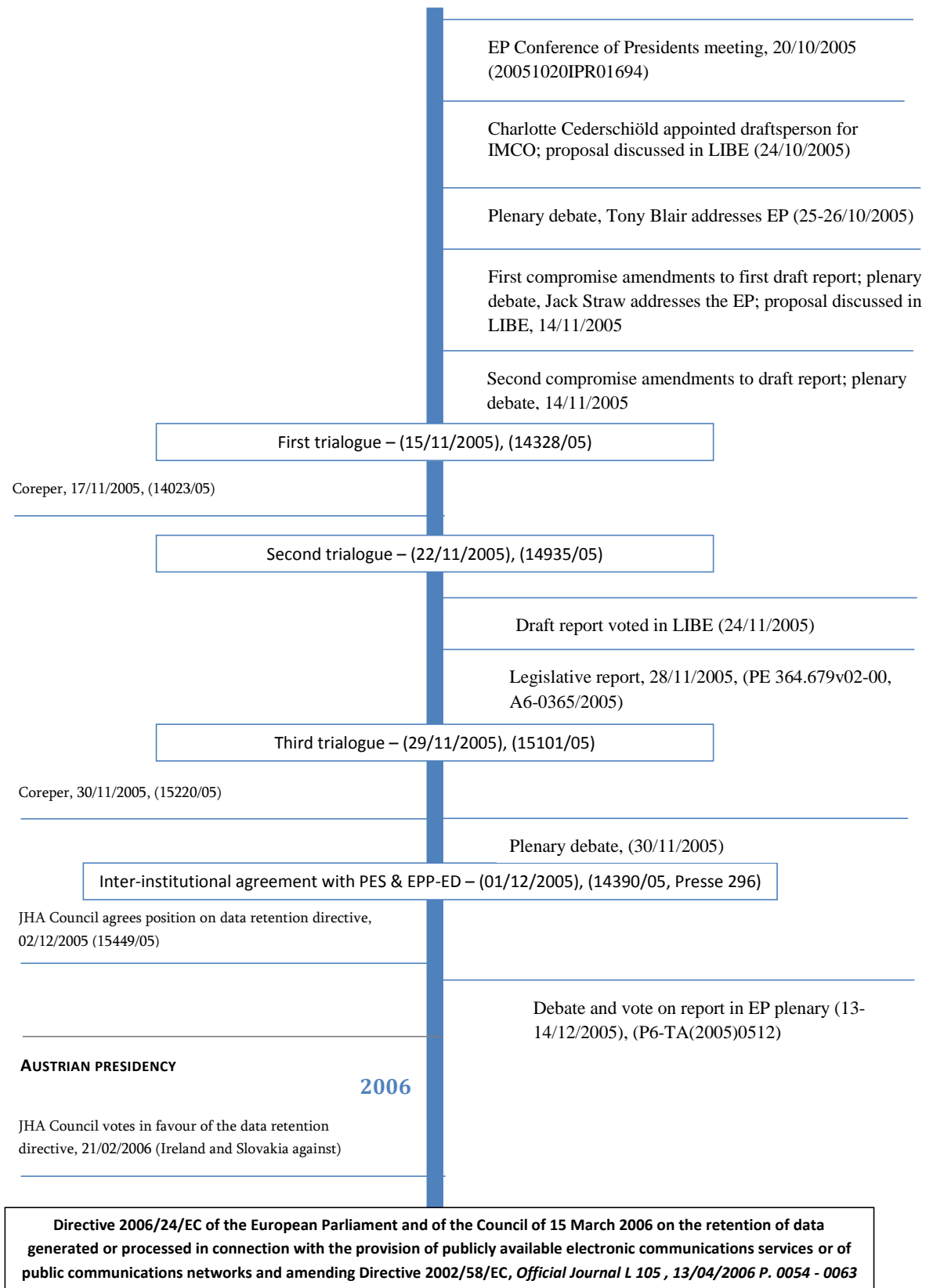
Framework Decision discussed in LIBE, 28/04/2005

Coreper, 19/05/2005, (8864/1/05)

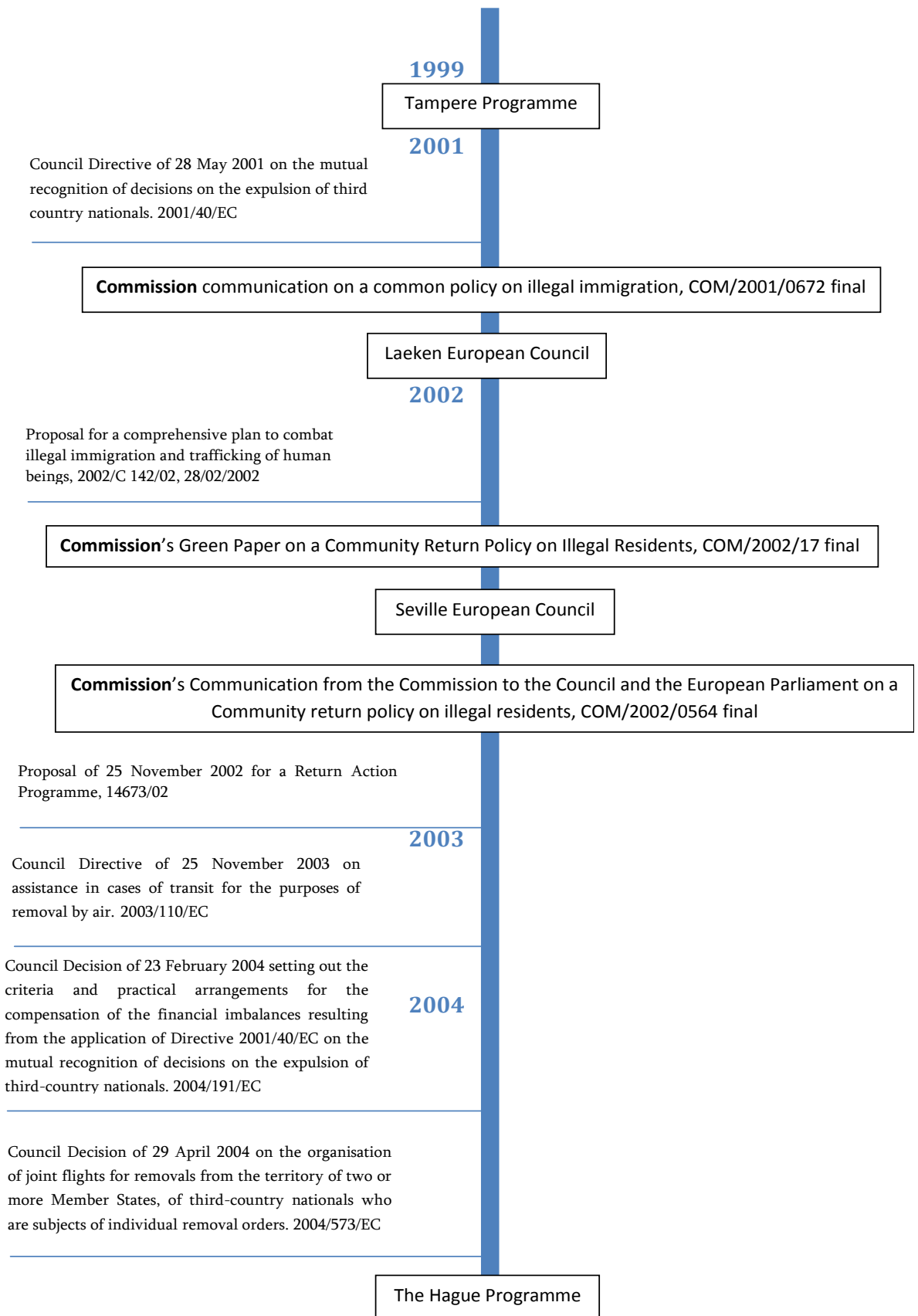
JHA Counsellors (Articles 2(2) and 6), 20/05/2005, (8864/1/05)

EP opinion (draft report on Fwk decision) voted in LIBE, 26/05/2005, (A6-0174/2005)

JHA Council meeting, 02-03/06/2005 (10609/05)	Report on Framework Decision, 31/05/2005, (A6-0174/2005, PE 357.618v03-00)
BRITISH PRESIDENCY	EP opinion (report) voted in plenary, 07/06/2005 (PV07/06/2005-6.8) (rejected and returned to LIBE)
Working Party on cooperation in criminal matters (Articles 1-5 and 8). 04-05/07/2005. (11510/05)	Written question put by Erik Meijer (GUE/NGL) to the COM on data retention. 21/06/2005, (E-2225/05)
Article 36 Committee (CATS), 07-08/07/2005, (8864/05)	Written question put by Stavros Lambrinidis (PSE) to the COM on data retention & MS, 06/07/2005, (P-2518/05)
Extraordinary JHA Council (Brussels), Declaration on the EU response to the London bombings. 13/07/2005.	
Working Party on cooperation in criminal matters (Article 7), 26-27/07/2005, (11586/05)	Charles Clarke, UK Home Secretary, addresses LIBE 13/07/2005, (20050826IPR01416)
	Written question put by Raül Romeva i Rueda (Verts/ALE) to the COM on data retention, 02/08/2005, (P-2518/05)
Informal JHA Council (Newcastle Gateshead), 08-09/09/2005, (12236/05)	Proposal discussed in LIBE, 05/09/2005
Working Party on cooperation in criminal matters, 12/09/2005, (12236/05)	Charles Clarke, UK Home Secretary, and Franco Frattini (COM) address plenary, 07/09/2005
Article 36 Committee (CATS), 20-21/09/2005, (12660/05, 12863/05)	
Commission proposal for directive of the European Parliament and the Council on the retention of data processed in connection with the provision of public electronic communication services and amending Directive 2002/58/EC, 21/09/2005, (COM(2005) 438 final) Impact assessment, (SEC(2005) 1131)	
	Alexander Alvaro appointed LIBE rapporteur for first pillar directive, proposal discussed in LIBE (26/09/2005)
Coreper (debate on legal basis), 29/09/2005, (12894/1/05)	EP opinion on Fwk Decision voted in plenary, 27/09/2005 (PV27/09/2005-6.7) (rejected)
IHA Counsellors , 30/09/2005, (12894/05)	Written question put by Claude Moraes (PSE) on data retention, 29/09/2005, (H-0713/0)
Coreper (debate on legal basis), 05/10/2005, (12894/1/05 REV1)	
JHA Council meeting, 12/10/2005 (13428/05,	Angelika Niebler appointed draftsperson for ITRE; proposal discussed in LIBE (05/10/2005)
Coreper, 19/10/2005, (13624/05)	Charles Clarke, UK Home Secretary, meets MEPs, proposal discussed in LIBE, 13/10/2005, (20051020IPR01694)
	Draft report, 19/10/2005, (PE 364.679v01-00)



Appendix 2: Time-line of the 'Returns' directive



BRITISH PRESIDENCY**2005**

Manfred Weber appointed rapporteur

Commission's Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in member States for returning illegally staying third-country nationals, COM/2005/391 final (01/09/2005)

LIBE Committee designed as responsible for the dossier, AFET and DEVE for opinions (29/09/2005)

Commission's Impact Assessment, SEC/2005/1175 (04/10/2005)

Working Party meeting (articles 1-3), 14814/05 (4 & 29/11/2005)

Panagiotis Beglitis appointed draftsman for AFET (19/10/2005)

Discussion in LIBE (24/11/2005)

AUSTRIAN PRESIDENCY**2006**

Working Party meeting (articles 4-6(1)), 6008/06 (23/01/2006)

Working Party meeting (article 6(2)-(4)), 10002/06 (12/04/2006)

Discussion in LIBE (20/03/2006)

Working Party meeting (articles 6(5)-8), 11051/06 (08/06/2006)

First draft report, PE371.747 (06/04/2006)

Second draft report, PE372.129 (18/04/2006)

Last draft report, PE374.321 (13/06/2006)

Discussion in LIBE (20/06/2006)

FINNISH PRESIDENCY

Working Party meeting (article 9(1)-(3)), 11456/06 (06/07/2006)

Working Party meeting (articles 9 -13), 13025/06 (13,14 & 26/09/2006)

Working Party meeting (articles 14-15), 13934/06 (26/09 & 09/10/2006)

Finnish compromise suggestions (articles 1-10), 13451/06 (06/10/2006)

Working Party meeting (articles 16-22), 14608/06 (25/10/2006)

Finnish compromise suggestions (articles 11-22), 15165/06 REV 1 (05/11/2006)

Working Party meeting (Finnish articles 1-3), 14743/06 (25/10 &	
Working Party meeting (Finnish articles 4-6), 15871/06 (24/11/2006)	
Working Party meeting (Finnish articles 6-9), 5874/07 (08/12/2006)	
GERMAN PRESIDENCY	2007
German proposal, 6624/07 (28/02/2007)	Discussion in LIBE (11/12/2006)
SCIFA meeting: revised German proposal, 8357/07 (19/03/2007)	
SCIFA meeting: revised German proposal, 10056/07 (21/05/2007)	Marie-Arlette Carlotti appointed draftswoman for DEVE (27/03/2007)
Portuguese compromise suggestions, 10903/07 (19/06/2007)	Discussion in LIBE (04/06/2007)
PORTUGUESE PRESIDENCY	Discussion in LIBE (27/06/2007)
Working Party meeting (Portuguese articles 1-6(2)), 11921/07 (12&13/07/2007)	
Working Party meeting (Portuguese articles 6(bis)-end), 13195/07 (19&20/09/2007)	Draft report voted in LIBE (12/09/2007)
Working Party meeting (Portuguese proposal – outstanding issues), 13658/07 (08/10/2007)	Report transmitted to plenary (20/09/2007)
Portuguese note to SCIFA, 13886/07, (16/10/2007)	
SCIFA meeting (Portuguese Articles 6(a), 8, 9, 12, 13, 13(a) and 14), 14321/07 (23&24/10/2007)	
Second Portuguese compromise suggestions, 14447/07 (29/10/2007)	Trialogues (technical and high political level)
JHA Counsellors meeting, (2 nd Portuguese compromise), 14783/07 (06/11/2007)	
Informal meeting (Council-EP): Vote on report delayed until 01/2008	
SCIFA meeting (2 nd Portuguese compromise and meeting with EP), 15566/07 (21/11/2007)	

2008

JHA Counsellors meeting, (2nd Portuguese compromise and trialogues), 6541/08 ADD1 (07/02/2008)

Slovenian compromise suggestions, outcome of trialogues, 6541/08 (15/02/2008)

Coreper meeting, (Slovenian compromise), 6785/08 (20/02/2008)

COMIX Ministerial level, (Slovenian compromise), 6965/08 (28/02/2008)

JHA Counsellors meeting, (Slovenian compromise), 6965/08, (07/03/2008)

Coreper meeting, (Slovenian compromise), 7774/08 (19/03/2008)

JHA Counsellors meeting, (Slovenian compromise), 7919/08, (28/03/2008)

JHA Council meeting, (Slovenian compromise), 8148/08 (18/04/2008)

Weber reports to LIBE (28/02/2008)

Triologue – First political compromise (23/04/2008)

COMIX, (1st political agreement), 8812/08 (07/05/2008)

COMIX, (1st political agreement), 9829/08 (21-22/05/2008)

Weber reports to LIBE (28/05/2008)

Triologue – Second political compromise (05/06/2008), (SP(2008)4439)

Amendments to report (10/06/2008): EPP-ED (A6 0339/74); Greens/EFA group (A6 0339/75-85); GUE/NGL group (A6 0339/86-93) and PES (A6 0339/95-104)

FRENCH PRESIDENCY

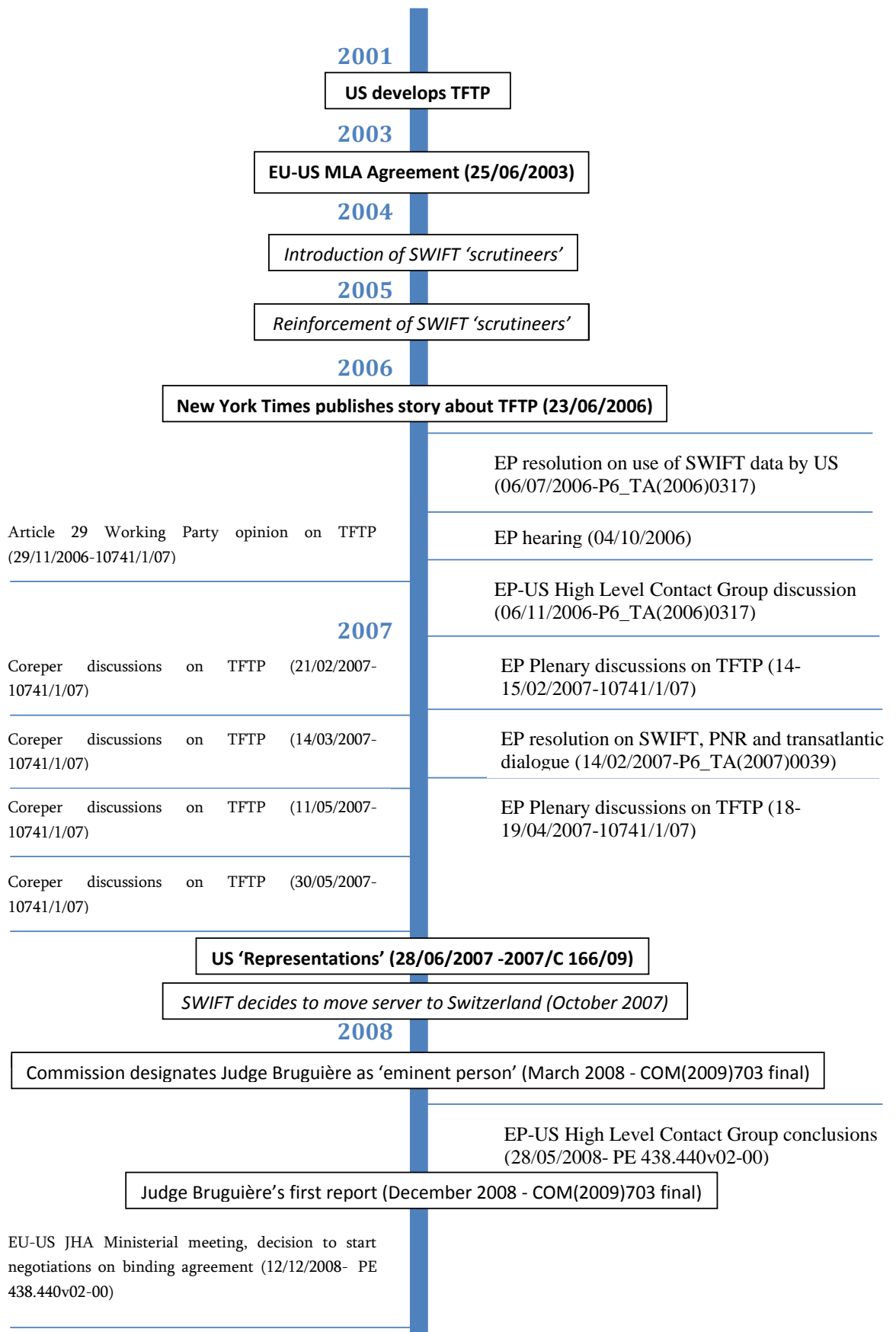
Statement by Malta, Council and Commission statements, 16166/08 ADD 1 REV (02/12/2008)

Council vote, 17081/08 (09/12/2008)

Debate and vote on report in EP plenary (17&18/06/2008), P6_TA(2008)0293

Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in member States for returning illegally staying third-country nationals, OJ L 348/98 (24/12/2008)

Appendix 3: Time-line of the SWIFT Agreement



2009

CZECH PRESIDENCY

Presentation of Bruguière's first report to JHA Council (26/02/2009-COM(2009)703 final)

Presentation of Bruguière's first report to LIBE (February 2009-COM(2009)703 final)

Council decision on the conclusion of the MLA Agreement (07/04/2009-7746/09)

Judge Bruguière's meetings with Washington (June 2009)

Coreper gives negotiating directives to presidency to negotiate TFTP (23/06/2009-11715/3/09/REV 3)

SWEDISH PRESIDENCY

Coreper gives mandate to presidency to negotiate TFTP (27/07/2009-15671/09)

Presidency, exploratory talks with US (29/07/2009-15671/09)

Presidency, exploratory talks with US (26/08/2009-15671/09)

Judge Bruguière's meetings with Washington and SWIFT (September 2009)

Discussions in LIBE (22/07/2009)

Discussions in LIBE (02/09/2009)

Presentation of Bruguière's first report to LIBE (03/09/2009-COM(2009)703 final)

Presidency, negotiates in Washington (9-11/09/2009-15671/09)

Motions for resolutions of 14/09/2009 drafted by Romeva i Rueda & Albrecht on behalf of the Verts/ALE Group (B7-0050/2009); Vergiat on behalf of the GUE/NGL Group (B7-0052/2009) and Busuttil, Strasser & Weber on behalf of the PPE Group, Moraes, Bullmann, Romero López & Sippel on behalf of the S&D Group, in 't Veld, Hennis-Plasschaert, Ludford, Michel, Alvaro, Griesbeck & Bowles on behalf of the ALDE Group and Kirkhope on behalf of the ECR Group (B7-0038/2009)

EP resolution (17/09/2009- P7_TA(2009)0016)

Presidency negotiates in Brussels (13-15/10/2009-15671/09)

Council decision on the conclusion of the extradition and MLA Agreements (23/10/2009-14826/09 (Presse 303))

Presidency negotiates in Washington (02-04/11/2009-15671/09)

JHA Counsellors meeting to discuss draft Council decision (09/11/2009-15671/09)

Council decision on signature of interim Agreement (27/11/2009-16110/09)

Reply from Reinfeldt to Buzek (28/11/2009-PE 432.300/CPG)

Letter from Buzek to Reinfeldt (26/07/2009-PE 432.300/CPG)

Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program, OJ L 8/11 (13/01/2010)

Judge Bruguière's meetings with Washington and SWIFT (December 2009)

Commission proposal for Council decision on conclusion of interim Agreement (17/12/2009 2009- COM(2009)703 final)

Coreper meeting (17/12/2009-5275/10)

Letter from Buzek to Reinfeldt (21/12/2009-PE 432.413/CPG)

SPANISH PRESIDENCY

2010

SWIFT moves server to Switzerland (01/01/2010)

Judge Bruguière's meetings with Washington (January 2010)

Judge Bruguière's second report (January 2008)

Coreper, Council requests consent of EP (15/01/2010-5366/10)

Reply from Lopez and Garrido to Buzek, Council decision on the conclusion of the interim Agreement (20/01/2010- PE 438.669/CPG, 5305/10)

Letter from Buzek to Zapatero (15/01/2010-PE 438.669/CPG)

EP Plenary discussions on TFTP (20/01/2010)

Text of the Agreement forwarded to the EP
(21/01/2010-5305/1/10 REV 1)

Article 29 Working Party opinion on TFTP
(22/01/2010)

EDPS opinion on TFTP (25/01/2010-PH/AS/amv
D(2010)0108 C2010-0028)

Reply from Zapatero to Buzek (26/01/2010-PE
438.772/CPG)

Letter from Buzek to Council (21/01/2010-
PE 438.772/CPG)

Spanish Justice Minister speaks to LIBE
(27/01/2010)

Entry into force MLA Agreement (01/02/2010)

Letter from Buzek to Zapatero (02/02/2010-PE
438.775/CPG)

LIBE draft report (03/02/2010-PE 438.440v01-
00)

Draft Council declaration on LIBE vote (05/02/2010-
6170/10)

LIBE vote (04/02/2010)

EP draft resolution (05/02/2010-PE
438.440v02-00)

Letter from Clinton to Buzek (05/02/2010-PE 438.776/CPG)

Council decision to declassify secret annex
(08/02/2010-6252/10)

Council declaration on TFTP and letter from
Zapatero to Buzek (09/02/2010-6170/2/10 REV 2, PE
438.784/CPG/Ann1)

Letter from Buzek to Barroso (09/02/2010)
and response from Barroso (10/02/2010--PE
438.784/CPG)

Spanish Interior Minister speaks to EP Plenary
(10/02/2010)

EP Plenary vote and legislative resolution
(11/02/2010-P7_TA(2010)0029)

Letter from Zapatero to Clinton closing negotiations on interim Agreement (22/02/2010-COM/2010/0317 final/2)

Commission Recommendation to the Council to open negotiations (24/03/2010-COM/2010/0317 final/2)

LIBE meeting (07/04/2010)

Motion for resolution on the Commission Recommendation, Hennis-Plasschaert on behalf of the ALDE Group, Sippel & Lambrinidis on behalf of the S&D Group, Strasser & Busuttil, on behalf of the PPE Group and Kirkhope on behalf of the ECR Group (19/04/2010 - B7-0243/2010/rev.2)

Coreper, political agreement on a mandate (23/04/2010)

EP Plenary debate (21/04/2010)

Motion for resolution on SWIFT, Ernst, Svensson, Tavares & Vergiat on behalf of the GUE/NGL Group (28/04/2010-B7-0260/2010)

EP resolution (05/05/2010-P7_TA(2010)0143)

Council adopts mandate and authorises Commission to open negotiations (11/05/2010- COM/2010/0317 final/2)

Joe Biden visits the EP (06/05/2010)

LIBE meeting (10/05/2010)

Draft Agreement (07/06/2010-10697/10)

Draft Agreement (11/06/2010-11048/10)

Commission Proposal for a Council decision on the signature (COM(2010) 316 final/2) and conclusion (COM(2010) 317 final/2) of the permanent Agreement (15/06/2010)

EDPS opinion (22/06/2010- N7-0030/2011)

Coreper meeting (24/06/2010-11350/2/10/REV 2)

Article 29 Working Party (25/06/2010)

Council decision to sign permanent Agreement (28/06/2010-11222/1/10 REV 1, 11350/2/10 REV 2)

Ireland and UK decide to participate in Agreement (12/07/2010-11338/1/10 REV 1, 12024/10) and Council, recommendation to adopt decision to conclude the Agreement (12/07/2010-11338/10)

Council decision to conclude the Agreement (13/07/2010-OJ L195/3, 27/07/2010)

EP draft recommendation on Council decision (29/06/2010-PE 445.596v01-00)

EP recommendation on Council decision (05/07/2010-PE 445.596v02-00)

Written question by Martin Ehrenhauser (NI) on US search of data (E-5143/2010), on 'data mining' (E-5141/2010) and on the cost of agreement (E-5144/2010) – (07/07/2010)

EP Plenary vote and legislative resolution (08/07/2010-P7_TA(2010)0279)

Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program, OJ L 195/5 (27/07/2010)

Appendix 4: Text of the 'Data retention' directive

Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC

Official Journal L 105, 13/04/2006 P. 0054 - 0063

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission,

Having regard to the Opinion of the European Economic and Social Committee [1],

Acting in accordance with the procedure laid down in Article 251 of the Treaty [2],

Whereas:

(1) Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [3] requires Member States to protect the rights and freedoms of natural persons with regard to the processing of personal data, and in particular their right to privacy, in order to ensure the free flow of personal data in the Community.

(2) Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) [4] translates the principles set out in Directive 95/46/EC into specific rules for the electronic communications sector.

(3) Articles 5, 6 and 9 of Directive 2002/58/EC lay down the rules applicable to the processing by network and service providers of traffic and location data generated by using electronic communications services. Such data must be erased or made anonymous when no longer needed for the purpose of the transmission of a communication, except for the data necessary for billing or interconnection payments. Subject to consent, certain data may also be processed for marketing purposes and the provision of value-added services.

(4) Article 15(1) of Directive 2002/58/EC sets out the conditions under which Member States may restrict the scope of the rights and obligations provided for in Article 5, Article 6, Article 8(1), (2), (3) and (4), and Article 9 of that Directive. Any such restrictions must be necessary, appropriate and proportionate within a democratic society for specific public order purposes, i.e. to safeguard national security (i.e. State security), defence, public security or the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communications systems.

(5) Several Member States have adopted legislation providing for the retention of data by service providers for the prevention, investigation, detection, and prosecution of criminal offences. Those national provisions vary considerably.

(6) The legal and technical differences between national provisions concerning the retention of data for the purpose of prevention, investigation, detection and prosecution of criminal offences present obstacles to the internal market for electronic communications, since service providers

are faced with different requirements regarding the types of traffic and location data to be retained and the conditions and periods of retention.

(7) The Conclusions of the Justice and Home Affairs Council of 19 December 2002 underline that, because of the significant growth in the possibilities afforded by electronic communications, data relating to the use of electronic communications are particularly important and therefore a valuable tool in the prevention, investigation, detection and prosecution of criminal offences, in particular organised crime.

(8) The Declaration on Combating Terrorism adopted by the European Council on 25 March 2004 instructed the Council to examine measures for establishing rules on the retention of communications traffic data by service providers.

(9) Under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), everyone has the right to respect for his private life and his correspondence. Public authorities may interfere with the exercise of that right only in accordance with the law and where necessary in a democratic society, *inter alia*, in the interests of national security or public safety, for the prevention of disorder or crime, or for the protection of the rights and freedoms of others. Because retention of data has proved to be such a necessary and effective investigative tool for law enforcement in several Member States, and in particular concerning serious matters such as organised crime and terrorism, it is necessary to ensure that retained data are made available to law enforcement authorities for a certain period, subject to the conditions provided for in this Directive. The adoption of an instrument on data retention that complies with the requirements of Article 8 of the ECHR is therefore a necessary measure.

(10) On 13 July 2005, the Council reaffirmed in its declaration condemning the terrorist attacks on London the need to adopt common measures on the retention of telecommunications data as soon as possible.

(11) Given the importance of traffic and location data for the investigation, detection, and prosecution of criminal offences, as demonstrated by research and the practical experience of several Member States, there is a need to ensure at European level that data that are generated or processed, in the course of the supply of communications services, by providers of publicly available electronic communications services or of a public communications network are retained for a certain period, subject to the conditions provided for in this Directive.

(12) Article 15(1) of Directive 2002/58/EC continues to apply to data, including data relating to unsuccessful call attempts, the retention of which is not specifically required under this Directive and which therefore fall outside the scope thereof, and to retention for purposes, including judicial purposes, other than those covered by this Directive.

(13) This Directive relates only to data generated or processed as a consequence of a communication or a communication service and does not relate to data that are the content of the information communicated. Data should be retained in such a way as to avoid their being retained more than once. Data generated or processed when supplying the communications services concerned refers to data which are accessible. In particular, as regards the retention of data relating to Internet e-mail and Internet telephony, the obligation to retain data may apply only in respect of data from the providers' or the network providers' own services.

(14) Technologies relating to electronic communications are changing rapidly and the legitimate requirements of the competent authorities may evolve. In order to obtain advice and encourage the sharing of experience of best practice in these matters, the Commission intends to establish a group composed of Member States' law enforcement authorities, associations of the electronic communications industry, representatives of the European Parliament and data protection authorities, including the European Data Protection Supervisor.

(15) Directive 95/46/EC and Directive 2002/58/EC are fully applicable to the data retained in accordance with this Directive. Article 30(1)(c) of Directive 95/46/EC requires the consultation of the Working Party on the Protection of Individuals with regard to the Processing of Personal Data established under Article 29 of that Directive.

(16) The obligations incumbent on service providers concerning measures to ensure data quality, which derive from Article 6 of Directive 95/46/EC, and their obligations concerning measures to ensure confidentiality and security of processing of data, which derive from Articles 16 and 17 of that Directive, apply in full to data being retained within the meaning of this Directive.

(17) It is essential that Member States adopt legislative measures to ensure that data retained under this Directive are provided to the competent national authorities only in accordance with national legislation in full respect of the fundamental rights of the persons concerned.

(18) In this context, Article 24 of Directive 95/46/EC imposes an obligation on Member States to lay down sanctions for infringements of the provisions adopted pursuant to that Directive. Article 15(2) of Directive 2002/58/EC imposes the same requirement in relation to national provisions adopted pursuant to Directive 2002/58/EC. Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems [5] provides that the intentional illegal access to information systems, including to data retained therein, is to be made punishable as a criminal offence.

(19) The right of any person who has suffered damage as a result of an unlawful processing operation or of any act incompatible with national provisions adopted pursuant to Directive 95/46/EC to receive compensation, which derives from Article 23 of that Directive, applies also in relation to the unlawful processing of any personal data pursuant to this Directive.

(20) The 2001 Council of Europe Convention on Cybercrime and the 1981 Council of Europe Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data also cover data being retained within the meaning of this Directive.

(21) Since the objectives of this Directive, namely to harmonise the obligations on providers to retain certain data and to ensure that those data are available for the purpose of the investigation, detection and prosecution of serious crime, as defined by each Member State in its national law, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of this Directive, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(22) This Directive respects the fundamental rights and observes the principles recognised, in particular, by the Charter of Fundamental Rights of the European Union. In particular, this Directive, together with Directive 2002/58/EC, seeks to ensure full compliance with citizens' fundamental rights to respect for private life and communications and to the protection of their personal data, as enshrined in Articles 7 and 8 of the Charter.

(23) Given that the obligations on providers of electronic communications services should be proportionate, this Directive requires that they retain only such data as are generated or processed in the process of supplying their communications services. To the extent that such data are not generated or processed by those providers, there is no obligation to retain them. This Directive is not intended to harmonise the technology for retaining data, the choice of which is a matter to be resolved at national level.

(24) In accordance with paragraph 34 of the Interinstitutional agreement on better law-making [6], Member States are encouraged to draw up, for themselves and in the interests of the

Community, their own tables illustrating, as far as possible, the correlation between this Directive and the transposition measures, and to make them public.

(25) This Directive is without prejudice to the power of Member States to adopt legislative measures concerning the right of access to, and use of, data by national authorities, as designated by them. Issues of access to data retained pursuant to this Directive by national authorities for such activities as are referred to in the first indent of Article 3(2) of Directive 95/46/EC fall outside the scope of Community law. However, they may be subject to national law or action pursuant to Title VI of the Treaty on European Union. Such laws or action must fully respect fundamental rights as they result from the common constitutional traditions of the Member States and as guaranteed by the ECHR. Under Article 8 of the ECHR, as interpreted by the European Court of Human Rights, interference by public authorities with privacy rights must meet the requirements of necessity and proportionality and must therefore serve specified, explicit and legitimate purposes and be exercised in a manner that is adequate, relevant and not excessive in relation to the purpose of the interference,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Subject matter and scope

1. This Directive aims to harmonise Member States' provisions concerning the obligations of the providers of publicly available electronic communications services or of public communications networks with respect to the retention of certain data which are generated or processed by them, in order to ensure that the data are available for the purpose of the investigation, detection and prosecution of serious crime, as defined by each Member State in its national law.
2. This Directive shall apply to traffic and location data on both legal entities and natural persons and to the related data necessary to identify the subscriber or registered user. It shall not apply to the content of electronic communications, including information consulted using an electronic communications network.

Article 2

Definitions

1. For the purpose of this Directive, the definitions in Directive 95/46/EC, in Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) [7], and in Directive 2002/58/EC shall apply.
2. For the purpose of this Directive:
 - (a) "data" means traffic data and location data and the related data necessary to identify the subscriber or user;
 - (b) "user" means any legal entity or natural person using a publicly available electronic communications service, for private or business purposes, without necessarily having subscribed to that service;
 - (c) "telephone service" means calls (including voice, voicemail and conference and data calls), supplementary services (including call forwarding and call transfer) and messaging and multi-media services (including short message services, enhanced media services and multi-media services);
 - (d) "user ID" means a unique identifier allocated to persons when they subscribe to or register with an Internet access service or Internet communications service;

(e) "cell ID" means the identity of the cell from which a mobile telephony call originated or in which it terminated;

(f) "unsuccessful call attempt" means a communication where a telephone call has been successfully connected but not answered or there has been a network management intervention.

Article 3

Obligation to retain data

1. By way of derogation from Articles 5, 6 and 9 of Directive 2002/58/EC, Member States shall adopt measures to ensure that the data specified in Article 5 of this Directive are retained in accordance with the provisions thereof, to the extent that those data are generated or processed by providers of publicly available electronic communications services or of a public communications network within their jurisdiction in the process of supplying the communications services concerned.

2. The obligation to retain data provided for in paragraph 1 shall include the retention of the data specified in Article 5 relating to unsuccessful call attempts where those data are generated or processed, and stored (as regards telephony data) or logged (as regards Internet data), by providers of publicly available electronic communications services or of a public communications network within the jurisdiction of the Member State concerned in the process of supplying the communication services concerned. This Directive shall not require data relating to unconnected calls to be retained.

Article 4

Access to data

Member States shall adopt measures to ensure that data retained in accordance with this Directive are provided only to the competent national authorities in specific cases and in accordance with national law. The procedures to be followed and the conditions to be fulfilled in order to gain access to retained data in accordance with necessity and proportionality requirements shall be defined by each Member State in its national law, subject to the relevant provisions of European Union law or public international law, and in particular the ECHR as interpreted by the European Court of Human Rights.

Article 5

Categories of data to be retained

1. Member States shall ensure that the following categories of data are retained under this Directive:

(a) data necessary to trace and identify the source of a communication:

(1) concerning fixed network telephony and mobile telephony:

(i) the calling telephone number;

(ii) the name and address of the subscriber or registered user;

(2) concerning Internet access, Internet e-mail and Internet telephony:

(i) the user ID(s) allocated;

(ii) the user ID and telephone number allocated to any communication entering the public telephone network;

(iii) the name and address of the subscriber or registered user to whom an Internet Protocol (IP) address, user ID or telephone number was allocated at the time of the communication;

(b) data necessary to identify the destination of a communication:

(1) concerning fixed network telephony and mobile telephony:

(i) the number(s) dialled (the telephone number(s) called), and, in cases involving supplementary services such as call forwarding or call transfer, the number or numbers to which the call is routed;

(ii) the name(s) and address(es) of the subscriber(s) or registered user(s);

(2) concerning Internet e-mail and Internet telephony:

(i) the user ID or telephone number of the intended recipient(s) of an Internet telephony call;

(ii) the name(s) and address(es) of the subscriber(s) or registered user(s) and user ID of the intended recipient of the communication;

(c) data necessary to identify the date, time and duration of a communication:

(1) concerning fixed network telephony and mobile telephony, the date and time of the start and end of the communication;

(2) concerning Internet access, Internet e-mail and Internet telephony:

(i) the date and time of the log-in and log-off of the Internet access service, based on a certain time zone, together with the IP address, whether dynamic or static, allocated by the Internet access service provider to a communication, and the user ID of the subscriber or registered user;

(ii) the date and time of the log-in and log-off of the Internet e-mail service or Internet telephony service, based on a certain time zone;

(d) data necessary to identify the type of communication:

(1) concerning fixed network telephony and mobile telephony: the telephone service used;

(2) concerning Internet e-mail and Internet telephony: the Internet service used;

(e) data necessary to identify users' communication equipment or what purports to be their equipment:

(1) concerning fixed network telephony, the calling and called telephone numbers;

(2) concerning mobile telephony:

(i) the calling and called telephone numbers;

(ii) the International Mobile Subscriber Identity (IMSI) of the calling party;

(iii) the International Mobile Equipment Identity (IMEI) of the calling party;

(iv) the IMSI of the called party;

(v) the IMEI of the called party;

(vi) in the case of pre-paid anonymous services, the date and time of the initial activation of the service and the location label (Cell ID) from which the service was activated;

(3) concerning Internet access, Internet e-mail and Internet telephony:

- (i) the calling telephone number for dial-up access;
- (ii) the digital subscriber line (DSL) or other end point of the originator of the communication;

(f) data necessary to identify the location of mobile communication equipment:

- (1) the location label (Cell ID) at the start of the communication;
- (2) data identifying the geographic location of cells by reference to their location labels (Cell ID) during the period for which communications data are retained.

2. No data revealing the content of the communication may be retained pursuant to this Directive.

Article 6

Periods of retention

Member States shall ensure that the categories of data specified in Article 5 are retained for periods of not less than six months and not more than two years from the date of the communication.

Article 7

Data protection and data security

Without prejudice to the provisions adopted pursuant to Directive 95/46/EC and Directive 2002/58/EC, each Member State shall ensure that providers of publicly available electronic communications services or of a public communications network respect, as a minimum, the following data security principles with respect to data retained in accordance with this Directive:

- (a) the retained data shall be of the same quality and subject to the same security and protection as those data on the network;
- (b) the data shall be subject to appropriate technical and organisational measures to protect the data against accidental or unlawful destruction, accidental loss or alteration, or unauthorised or unlawful storage, processing, access or disclosure;
- (c) the data shall be subject to appropriate technical and organisational measures to ensure that they can be accessed by specially authorised personnel only;

and

- (d) the data, except those that have been accessed and preserved, shall be destroyed at the end of the period of retention.

Article 8

Storage requirements for retained data

Member States shall ensure that the data specified in Article 5 are retained in accordance with this Directive in such a way that the data retained and any other necessary information relating to such data can be transmitted upon request to the competent authorities without undue delay.

Article 9

Supervisory authority

1. Each Member State shall designate one or more public authorities to be responsible for monitoring the application within its territory of the provisions adopted by the Member States

pursuant to Article 7 regarding the security of the stored data. Those authorities may be the same authorities as those referred to in Article 28 of Directive 95/46/EC.

2. The authorities referred to in paragraph 1 shall act with complete independence in carrying out the monitoring referred to in that paragraph.

Article 10

Statistics

1. Member States shall ensure that the Commission is provided on a yearly basis with statistics on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or a public communications network. Such statistics shall include:

- the cases in which information was provided to the competent authorities in accordance with applicable national law,
- the time elapsed between the date on which the data were retained and the date on which the competent authority requested the transmission of the data,
- the cases where requests for data could not be met.

2. Such statistics shall not contain personal data.

Article 11

Amendment of Directive 2002/58/EC

The following paragraph shall be inserted in Article 15 of Directive 2002/58/EC:

“1a. Paragraph 1 shall not apply to data specifically required by Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks [*] to be retained for the purposes referred to in Article 1(1) of that Directive.”

Article 12

Future measures

1. A Member State facing particular circumstances that warrant an extension for a limited period of the maximum retention period referred to in Article 6 may take the necessary measures. That Member State shall immediately notify the Commission and inform the other Member States of the measures taken under this Article and shall state the grounds for introducing them.

2. The Commission shall, within a period of six months after the notification referred to in paragraph 1, approve or reject the national measures concerned, after having examined whether they are a means of arbitrary discrimination or a disguised restriction of trade between Member States and whether they constitute an obstacle to the functioning of the internal market. In the absence of a decision by the Commission within that period the national measures shall be deemed to have been approved.

3. Where, pursuant to paragraph 2, the national measures of a Member State derogating from the provisions of this Directive are approved, the Commission may consider whether to propose an amendment to this Directive.

Article 13

Remedies, liability and penalties

1. Each Member State shall take the necessary measures to ensure that the national measures implementing Chapter III of Directive 95/46/EC providing for judicial remedies, liability and sanctions are fully implemented with respect to the processing of data under this Directive.
2. Each Member State shall, in particular, take the necessary measures to ensure that any intentional access to, or transfer of, data retained in accordance with this Directive that is not permitted under national law adopted pursuant to this Directive is punishable by penalties, including administrative or criminal penalties, that are effective, proportionate and dissuasive.

Article 14

Evaluation

1. No later than 15 September 2010, the Commission shall submit to the European Parliament and the Council an evaluation of the application of this Directive and its impact on economic operators and consumers, taking into account further developments in electronic communications technology and the statistics provided to the Commission pursuant to Article 10 with a view to determining whether it is necessary to amend the provisions of this Directive, in particular with regard to the list of data in Article 5 and the periods of retention provided for in Article 6. The results of the evaluation shall be made public.
2. To that end, the Commission shall examine all observations communicated to it by the Member States or by the Working Party established under Article 29 of Directive 95/46/EC.

Article 15

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by no later than 15 September 2007. They shall forthwith inform the Commission thereof. When Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.
2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.
3. Until 15 March 2009, each Member State may postpone application of this Directive to the retention of communications data relating to Internet Access, Internet telephony and Internet e-mail. Any Member State that intends to make use of this paragraph shall, upon adoption of this Directive, notify the Council and the Commission to that effect by way of a declaration. The declaration shall be published in the Official Journal of the European Union.

Article 16

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

Article 17

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 15 March 2006.

For the European Parliament, The President, J. Borrell Fontelles

For the Council, The President, H. Winkler

[1] Opinion delivered on 19 January 2006 (not yet published in the Official Journal).

[2] Opinion of the European Parliament of 14 December 2005 (not yet published in the Official Journal) and Council Decision of 21 February 2006.

[3] OJ L 281, 23.11.1995, p. 31. Directive as amended by Regulation (EC) No 1882/2003 (OJ L 284, 31.10.2003, p. 1).

[4] OJ L 201, 31.7.2002, p. 37.

[5] OJ L 69, 16.3.2005, p. 67.

[6] OJ C 321, 31.12.2003, p. 1.

[7] OJ L 108, 24.4.2002, p. 33.

[*] OJ L 105, 13.4.2006, p. 54

Declaration by the Netherlands

pursuant to Article 15(3) of Directive 2006/24/EC

Regarding the Directive of the European Parliament and of the Council on the retention of data processed in connection with the provision of publicly available electronic communications services and amending Directive 2002/58/EC, the Netherlands will be making use of the option of postponing application of the Directive to the retention of communications data relating to Internet access, Internet telephony and Internet e-mail, for a period not exceeding 18 months following the date of entry into force of the Directive.

Declaration by Austria

pursuant to Article 15(3) of Directive 2006/24/EC

Austria declares that it will be postponing application of this Directive to the retention of communications data relating to Internet access, Internet telephony and Internet e-mail, for a period of 18 months following the date specified in Article 15(1).

Declaration by Estonia

pursuant to Article 15(3) of Directive 2006/24/EC

In accordance with Article 15(3) of the Directive of the European Parliament and of the Council on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, Estonia hereby states its intention to make use of that paragraph and to postpone application of the Directive to retention of communications data relating to Internet access, Internet telephony and Internet e-mail until 36 months after the date of adoption of the Directive.

Declaration by the United Kingdom

pursuant to Article 15(3) of Directive 2006/24/EC

The United Kingdom declares in accordance with Article 15(3) of the Directive on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC that it will postpone application of that Directive to the retention of communications data relating to Internet access, Internet telephony and Internet e-mail.

Declaration by the Republic of Cyprus

pursuant to Article 15(3) of Directive 2006/24/EC

The Republic of Cyprus declares that it is postponing application of the Directive in respect of the retention of communications data relating to Internet access, Internet telephony and Internet e-mail until the date fixed in Article 15(3).

Declaration by the Hellenic Republic

pursuant to Article 15(3) of Directive 2006/24/EC

Greece declares that, pursuant to Article 15(3), it will postpone application of this Directive in respect of the retention of communications data relating to Internet access, Internet telephony and Internet e-mail until 18 months after expiry of the period provided for in Article 15(1).

Declaration by the Grand Duchy of Luxembourg

pursuant to Article 15(3) of Directive 2006/24/EC

Pursuant to Article 15(3) of the Directive of the European Parliament and of the Council on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, the Government of the Grand Duchy of Luxembourg declares that it intends to make use of Article 15(3) of the Directive in order to have the option of postponing application of the Directive to the retention of communications data relating to Internet access, Internet telephony and Internet e-mail.

Declaration by Slovenia

pursuant to Article 15(3) of Directive 2006/24/EC

Slovenia is joining the group of Member States which have made a declaration under Article 15(3) of the Directive of the European Parliament and the Council on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks, for the 18 months postponement of the application of the Directive to the retention of communication data relating to Internet, Internet telephony and Internet e-mail.

Declaration by Sweden

pursuant to Article 15(3) of Directive 2006/24/EC

Pursuant to Article 15(3), Sweden wishes to have the option of postponing application of this Directive to the retention of communications data relating to Internet access, Internet telephony and Internet e-mail.

Declaration by the Republic of Lithuania

pursuant to Article 15(3) of Directive 2006/24/EC

Pursuant to Article 15(3) of the draft Directive of the European Parliament and of the Council on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or public communications networks and amending Directive 2002/58/EC (hereafter the "Directive"), the Republic of Lithuania declares that once the Directive has been adopted it will postpone the application thereof to the retention of communications data relating to Internet access, Internet telephony and Internet e-mail for the period provided for in Article 15(3).

Declaration by the Republic of Latvia

pursuant to Article 15(3) of Directive 2006/24/EC

Latvia states in accordance with Article 15(3) of Directive 2006/24/EC of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC that it is postponing application of the Directive to the retention of communications data relating to Internet access, Internet telephony and Internet e-mail until 15 March 2009.

Declaration by the Czech Republic

pursuant to Article 15(3) of Directive 2006/24/EC

Pursuant to Article 15(3), the Czech Republic hereby declares that it is postponing application of this Directive to the retention of communications data relating to Internet access, Internet telephony and Internet e-mail until 36 months after the date of adoption thereof.

Declaration by Belgium

pursuant to Article 15(3) of Directive 2006/24/EC

Belgium declares that, taking up the option available under Article 15(3), it will postpone application of this Directive, for a period of 36 months after its adoption, to the retention of communications data relating to Internet access, Internet telephony and Internet e-mail.

Declaration by the Republic of Poland

pursuant to Article 15(3) of Directive 2006/24/EC

Poland hereby declares that it intends to make use of the option provided for under Article 15(3) of the Directive of the European Parliament and of the Council on the retention of data processed in connection with the provision of publicly available electronic communications services and amending Directive 2002/58/EC and postpone application of the Directive to the retention of communications data relating to Internet access, Internet telephony and Internet e-mail for a period of 18 months following the date specified in Article 15(1).

 Declaration by Finland

pursuant to Article 15(3) of Directive 2006/24/EC

Finland declares in accordance with Article 15(3) of the Directive on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC that it will postpone application of that Directive to the retention of communications data relating to Internet access, Internet telephony and Internet e-mail.

Declaration by Germany

pursuant to Article 15(3) of Directive 2006/24/EC

Germany reserves the right to postpone application of this Directive to the retention of communications data relating to Internet access, Internet telephony and Internet e-mail for a period of 18 months following the date specified in the first sentence of Article 15(1).

Appendix 5: Text of the Commission's proposal for a 'Returns' directive

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 1.9.2005; COM(2005) 391 final; 2005/0167 (COD)

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on common standards and procedures in Member States for returning illegally staying third-country nationals

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 63(3)(b) thereof,

Having regard to the proposal from the Commission,

Acting in accordance with the procedure laid down in Article 251 of the Treaty,

Whereas:

- (1) The Brussels European Council of 4 and 5 November 2004 called for the establishment of an effective removal and repatriation policy, based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity.
- (2) Clear, transparent and fair rules need to be fixed to provide for an effective return policy as a necessary element of a well managed migration policy.
- (3) This Directive should establish a horizontal set of rules, applicable to all third-country nationals who do not or who no longer fulfil the conditions for stay in a Member State.
- (4) Member States should ensure that the ending of illegal stay is carried out through a fair and transparent procedure.
- (5) As a general principle, a harmonised two-step procedure should be applied, involving a return decision as a first step and, where necessary, the issuing of a removal order as a second step. However, in order to avoid possible procedural delays, Member States should be allowed to issue both a return decision and a removal order within a single act or decision.

(6) Where there are no reasons to believe that this would undermine the purpose of a return procedure, voluntary return should be preferred over forced return and a period for voluntary departure should be granted.

(7) A common minimum set of legal safeguards on return and removal decisions should be established to guarantee effective protection of the interests of the individuals concerned.

(8) The situation of persons who are staying illegally but who cannot (yet) be removed should be addressed. Minimum standards for the conditions of stay of these persons should be established, with reference to the provisions of Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers .

(9) The use of coercive measures should be expressly bound to the principle of proportionality and minimum safeguards for the conduct of forced return should be established, taking into account Council Decision 2004/573/EC of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subject of individual removal orders .

(10) The effects of national return measures should be given a European dimension by establishing a re-entry ban preventing re-entry into the territory of all the Member States.

The length of the re-entry ban should be determined with due regard to all relevant circumstances of an individual case and should not normally exceed 5 years. In cases of serious threat to public policy or public security, Member States should be allowed to impose a longer re-entry ban.

(11) The use of temporary custody should be limited and bound to the principle of proportionality. Temporary custody should only be used if necessary to prevent the risk of absconding and if the application of less coercive measures would not be sufficient.

(12) Provision should be made to deal with the situation of a third-country national who is the subject of a removal order or return decision issued by a Member State and is apprehended in the territory of another Member State.

(13) This Directive includes provisions on the recognition of return decisions or removal orders which supersede Council Directive 2001/40/EC on mutual recognition of decisions on the expulsion of third-country nationals. That Directive should therefore be repealed.

(14) Council Decision 2004/191/EC sets out criteria and practical arrangements for the compensation of financial imbalances resulting from mutual recognition of expulsion decisions, which should be applied *mutatis mutandis* when recognising return decisions or removal orders according to this Directive.

(15) Member States should have rapid access to information on return decisions, removal orders and re-entry bans issued by other Member States. This information sharing should take place in accordance with [Decision/Regulation ... on the establishment, operation and use of the Second Generation Schengen Information System (SIS II)]

(16) Since the objective of this Directive, namely to establish common rules concerning return, removal, use of coercive measures, temporary custody and re-entry, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary to achieve that objective.

(17) Member States should give effect to the provisions of this Directive without discrimination on the basis of sex, race, colour, ethnic or social origin, genetic features, language, religion or

belief, political or any other opinions, membership of a national minority, property, birth, disability, age or sexual orientation.

(18) In line with the 1989 United Nations Convention on the Rights of the Child, the “best interests of the child” should be a primary consideration of Member States when implementing this Directive. In line with the European Convention on Human Rights, respect for family life should be a primary consideration of Member States when implementing this Directive.

(19) Application of this Directive is without prejudice to the obligations resulting from the Geneva Convention relating to the Status of Refugees of 28 July 1951, as amended by the New York Protocol of 31 January 1967.

(20) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.

(21) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application. Given that this Directive builds - to the extent that it applies to third country nationals who do not fulfil or who no longer fulfil the conditions of entry in accordance with the Convention Implementing the Schengen Agreement - upon the Schengen acquis under the provisions of Title IV of Part Three of the Treaty establishing the European Community, Denmark should, in accordance with Article 5 of the said Protocol, decide, within a period of six months after the adoption of this Directive, whether it will implement it in its national law.

(22) This Directive constitutes - to the extent that it applies to third country nationals who do not fulfil or who no longer fulfil the conditions of entry in accordance with the Convention Implementing the Schengen Agreement - a development of provisions of the Schengen acquis within the meaning of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen acquis, which fall within the area referred to in Article 1, point C of Council Decision 1999/437/EC on certain arrangements for the application of that Agreement.

(23) This Directive constitutes a development of the provisions of the Schengen acquis within the meaning of the Agreement signed by the European Union, the European Community and the Swiss Confederation on the latter's association with the implementation, application and development of the Schengen acquis which fall within the area referred to in Article 4(1) of Council Decision 2004/860/EC on the provisional application of certain provisions of that Agreement.

(24) This Directive constitutes - to the extent that it applies to third country nationals who do not fulfil or who no longer fulfil the conditions of entry in accordance with the Convention Implementing the Schengen Agreement - an act building on the Schengen acquis or otherwise related to it within the meaning of Article 3(2) of the Act of Accession,

HAVE ADOPTED THIS DIRECTIVE:

Chapter I

GENERAL PROVISIONS

Article 1

Subject matter

This Directive sets out common standards and procedures to be applied in Member States for returning illegally staying third-country nationals, in accordance with fundamental rights as

general principles of Community law as well as international law, including refugee protection and human rights obligations.

Article 2

Scope

1. This Directive applies to third-country nationals staying illegally in the territory of a Member State, i.e.

(a) who do not fulfil or who no longer fulfil the conditions of entry as set out in Article 5 of the Convention Implementing the Schengen Agreement, or

(b) who are otherwise illegally staying in the territory of a Member State.

2. Member States may decide not to apply this Directive to third-country nationals who have been refused entry in a transit zone of a Member State. However, they shall ensure that the treatment and the level of protection of such third-country nationals is not less favourable than set out in Articles 8, 10, 13 and 15.

3. This Directive shall not apply to third-country nationals

(a) who are family members of citizens of the Union who have exercised their right to free movement within the Community or

(b) who, under agreements between the Community and its Member States, on the one hand, and the countries of which they are nationals, on the other, enjoy rights of free movement equivalent to those of citizens of the Union.

Article 3

Definitions

For the purpose of this Directive the following definitions shall apply:

(a) 'third-country national' means any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty;

(b) 'illegal stay' means the presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions for stay or residence in that Member State;

(c) 'return' means the process of going back to one's country of origin, transit or another third country, whether voluntary or enforced;

(d) 'return decision' means an administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing an obligation to return;

(e) 'removal' means the execution of the obligation to return, namely the physical transportation out of the country;

(f) 'removal order' means an administrative or judicial decision or act ordering the removal;

(g) "re-entry ban" means an administrative or judicial decision or act preventing re-entry into the territory of the Member States for a specified period.

Article 4

More favourable provisions

1. This Directive shall be without prejudice to more favourable provisions of:

(a) bilateral or multilateral agreements between the Community or the Community and its Member States and one or more third countries;

(b) bilateral or multilateral agreements between one or more Member States and one or more third countries.

2. This Directive shall be without prejudice to any provision which may be more favourable for the third country national laid down in Community legislation in the field of immigration and asylum, in particular in:

- (a) Council Directive 2003/86/EC on the right to family reunification,
- (b) Council Directive 2003/109/EC concerning the status of third country nationals who are long-term residents,
- (c) Council Directive 2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities ,
- (d) Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted,
- (e) Council Directive 2004/114/EC on the conditions of admission of third country nationals for the purpose of studies, pupil exchange, unremunerated training or voluntary service,
- (f) Council Directive 2005/XX/EC on a specific procedure for admitting third-country nationals for purposes of scientific research.

3. This Directive shall be without prejudice to the right of the Member States to adopt or maintain provisions that are more favourable to persons to whom it applies provided that such provisions are compatible with this Directive.

Article 5

Family relationships and best interest of the child

When implementing this Directive, Member States shall take due account of the nature and solidity of the third country national's family relationships, the duration of his stay in the Member State and of the existence of family, cultural and social ties with his country of origin. They shall also take account of the best interests of the child in accordance with the 1989 United Nations Convention on the Rights of the Child.

Chapter II

TERMINATION OF ILLEGAL STAY

Article 6

Return decision

1. Member States shall issue a return decision to any third-country national staying illegally on their territory.
2. The return decision shall provide for an appropriate period for voluntary departure of up to four weeks, unless there are reasons to believe that the person concerned might abscond during such a period. Certain obligations aimed at avoiding the risk of absconding, such as regular reporting to the authorities, deposit of a financial guarantee, submission of documents or the obligation to stay at a certain place may be imposed for the duration of that period.
3. The return decision shall be issued as a separate act or decision or together with a removal order.
4. Where Member States are subject to obligations derived from fundamental rights as resulting, in particular, from the European Convention on Human Rights, such as the right to non-

refoulment, the right to education and the right to family unity, no return decision shall be issued. Where a return decision has already been issued, it shall be withdrawn.

5. Member States may, at any moment decide to grant an autonomous residence permit or another authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory. In this event no return decision shall be issued or where a return decision has already been issued, it shall be withdrawn.

6. Where a third-country national staying illegally in the territory of a Member State holds a valid residence permit issued by another Member State, the first Member State shall refrain from issuing a return decision where that person goes back voluntarily to the territory of the Member State which issued the residence permit..

7. If a third-country national staying illegally in its territory is the subject of a pending procedure for renewing his residence permit or any other permit offering the right to stay, that Member State shall refrain from issuing a return decision, until the pending procedure is finished.

8. If a third-country national staying illegally in its territory is the subject of a pending procedure for granting his residence permit or any other permit offering the right to stay, that Member State may refrain from issuing a return decision, until the pending procedure is finished.

Article 7

Removal order

1. Member States shall issue a removal order concerning a third-country national who is subject of a return decision, if there is a risk of absconding or if the obligation to return has not been complied with within the period of voluntary departure granted in accordance with Article 6(2).

2. The removal order shall specify the delay within which the removal will be enforced and the country of return.

3. The removal order shall be issued as a separate act or decision or together with the return decision.

Article 8

Postponement

1. Member States may postpone the enforcement of a return decision for an appropriate period, taking into account the specific circumstances of the individual case.

2. Member States shall postpone the execution of a removal order in the following circumstances, for as long as those circumstances prevail:

(a) inability of the third-country national to travel or to be transported to the country of return due to his or her physical state or mental capacity;

(b) technical reasons, such as lack of transport capacity or other difficulties making it impossible to enforce the removal in a humane manner and with full respect for the third-country national's fundamental rights and dignity;

(c) lack of assurance that unaccompanied minors can be handed over at the point of departure or upon arrival to a family member, an equivalent representative, a guardian of the minor or a competent official of the country of return, following an assessment of the conditions to which the minor will be returned.

3. If enforcement of a return decision or execution of a removal order is postponed as provided for in paragraphs 1 and 2, certain obligations may be imposed on the third country national

concerned, with a view to avoiding the risk of absconding, such as regular reporting to the authorities, deposit of a financial guarantee, submission of documents or the obligation to stay at a certain place.

Article 9

Re-entry ban

1. Removal orders shall include a re-entry ban of a maximum of 5 years.

Return decisions may include such a re-entry ban.

2. The length of the re-entry ban shall be determined with due regard to all relevant circumstances of the individual case, and in particular if the third-country national concerned:

- (a) is the subject of a removal order for the first time;
- (b) has already been the subject of more than one removal order;
- (c) entered the Member State during a re-entry ban;
- (d) constitutes a threat to public policy or public security.

The re-entry ban may be issued for a period exceeding 5 years where the third-country national concerned constitutes a serious threat to public policy or public security.

3. The re-entry ban may be withdrawn, in particular in cases in which the third-country national concerned :

- (a) is the subject of a return decision or a removal order for the first time;
- (b) has reported back to a consular post of a Member State;
- (c) has reimbursed all costs of his previous return procedure.

4. The re-entry ban may be suspended on an exceptional and temporary basis in appropriate individual cases.

5. Paragraphs 1 to 4 apply without prejudice to the right to seek asylum in one of the Member States.

Article 10

Removal

1. Where Member States use coercive measures to carry out the removal of a third-country national who resists removal, such measures shall be proportional and shall not exceed reasonable force. They shall be implemented in accordance with fundamental rights and with due respect for the dignity of the third-country national concerned.

2. In carrying out removals, Member States shall take into account the common Guidelines on security provisions for joint removal by air, attached to Decision 2004/573/EC.

Chapter III

PROCEDURAL SAFEGUARDS

Article 11

Form

1. Return decisions and removal orders shall be issued in writing.

Member States shall ensure that the reasons in fact and in law are stated in the decision and/or order and that the third-country national concerned is informed about the available legal remedies in writing.

2. Member States shall provide, upon request, a written or oral translation of the main elements of the return decision and/or removal order in a language the third-country national may reasonably be supposed to understand.

Article 12

Judicial remedies

1. Member States shall ensure that the third-country national concerned has the right to an effective judicial remedy before a court or tribunal to appeal against or to seek review of a return decision and/or removal order.

2. The judicial remedy shall either have suspensive effect or comprise the right of the third country national to apply for the suspension of the enforcement of the return decision or removal order in which case the return decision or removal order shall be postponed until it is confirmed or is no longer subject to a remedy which has suspensive effects.

3. Member States shall ensure that the third-country national concerned has the possibility to obtain legal advice, representation and, where necessary, linguistic assistance. Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice.

Article 13

Safeguards pending return

1. Member States shall ensure that the conditions of stay of third-country nationals for whom the enforcement of a return decision has been postponed or who cannot be removed for the reasons referred to in Article 8 of this Directive are not less favourable than those set out in Articles 7 to 10, Article 15 and Articles 17 to 20 of Directive 2003/9/EC.

2. Member States shall provide the persons referred to in paragraph 1 with a written confirmation that the enforcement of the return decision has been postponed for a specified period or that the removal order will temporarily not be executed.

Chapter IV

TEMPORARY CUSTODY FOR THE PURPOSE OF REMOVAL

Article 14

Temporary custody

1. Where there are serious grounds to believe that there is a risk of absconding and where it would not be sufficient to apply less coercive measures, such as regular reporting to the authorities, the deposit of a financial guarantee, the handing over of documents, an obligation to stay at a designated place or other measures to prevent that risk, Member States shall keep under temporary custody a third-country national, who is or will be subject of a removal order or a return decision,

2. Temporary custody orders shall be issued by judicial authorities. In urgent cases they may be issued by administrative authorities, in which case the temporary custody order shall be confirmed by judicial authorities within 72 hours from the beginning of the temporary custody.

3. Temporary custody orders shall be subject to review by judicial authorities at least once a month.

4. Temporary custody may be extended by judicial authorities to a maximum of six months.

Article 15

Conditions of temporary custody

1. Member States shall ensure that third-country nationals under temporary custody are treated in a humane and dignified manner with respect for their fundamental rights and in compliance with international and national law. Upon request they shall be allowed without delay to establish contact with legal representatives, family members and competent consular authorities as well as with relevant international and non-governmental organisations.
2. Temporary custody shall be carried out in specialised temporary custody facilities. Where a Member State cannot provide accommodation in a specialised temporary custody facility and has to resort to prison accommodation, it shall ensure that third-country nationals under temporary custody are permanently physically separated from ordinary prisoners.
3. Particular attention shall be paid to the situation of vulnerable persons. Member States shall ensure that minors are not kept in temporary custody in common prison accommodation. Unaccompanied minors shall be separated from adults unless it is considered in the child's best interest not to do so.
4. Member States shall ensure that international and non-governmental organisations have the possibility to visit temporary custody facilities in order to assess the adequacy of the temporary custody conditions. Such visits may be subject to authorisation.

Chapter V

APPREHENSION IN OTHER MEMBER STATES

Article 16

Apprehension in other Member States

Where a third-country national who does not fulfil or who no longer fulfil the conditions of entry as set out in Article 5 of the Convention Implementing the Schengen Agreement and who is the subject of a return decision or removal order issued in a Member State ("the first Member State") is apprehended in the territory of another Member State ("the second Member State"), the second Member State may take one of the following steps:

- (a) recognise the return decision or removal order issued by the first Member State and carry out the removal, in which case Member States shall compensate each other for any financial imbalance which may be caused, applying Council Decision 2004/191/EC *mutatis mutandis*;
- (b) request the first Member State to take back the third-country national concerned without delay, in which case the first Member State shall be obliged to comply with the request, unless it can demonstrate that the person concerned has left the territory of the Member States following the issuing of the return decision or removal order by the first Member State;
- (c) launch the return procedure under its national legislation;
- (d) maintain or issue a residence permit or another authorisation offering a right to stay for protection-related, compassionate, humanitarian or other reasons, after consultation with the first Member State in accordance with Article 25 of the Convention Implementing the Schengen Agreement.

Chapter VI

FINAL PROVISIONS

Article 17

Reporting

The Commission shall periodically report to the European Parliament and the Council on the application of this Directive in the Member States and, if appropriate, propose amendments.

The Commission shall report for the first time four years after the date referred to in Article 18(1) at the latest.

Article 18

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by, (24 months from the date of publication in the Official Journal of the European Union) at the latest. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 19

Relationship with Schengen Convention

This Directive replaces Articles 23 and 24 of the Convention implementing the Schengen Agreement.

Article 20

Repeal

Directive 2001/40/EC is repealed.

Article 21

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

Article 22

Addressees

This Directive is addressed to the Member States in accordance with the Treaty establishing the European Community.

Appendix 6: Text of the 'Returns' directive

Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals

Official Journal L 348 , 24/12/2008 P. 0098 - 0107

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 63(3)(b) thereof,

Having regard to the proposal from the Commission,

Acting in accordance with the procedure laid down in Article 251 of the Treaty [1],

Whereas:

- (1) The Tampere European Council of 15 and 16 October 1999 established a coherent approach in the field of immigration and asylum, dealing together with the creation of a common asylum system, a legal immigration policy and the fight against illegal immigration.
- (2) The Brussels European Council of 4 and 5 November 2004 called for the establishment of an effective removal and repatriation policy, based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity.
- (3) On 4 May 2005 the Committee of Ministers of the Council of Europe adopted "Twenty guidelines on forced return".
- (4) Clear, transparent and fair rules need to be fixed to provide for an effective return policy as a necessary element of a well managed migration policy.
- (5) This Directive should establish a horizontal set of rules, applicable to all third-country nationals who do not or who no longer fulfil the conditions for entry, stay or residence in a Member State.
- (6) Member States should ensure that the ending of illegal stay of third-country nationals is carried out through a fair and transparent procedure. According to general principles of EU law, decisions taken under this Directive should be adopted on a case-by-case basis and based on objective criteria, implying that consideration should go beyond the mere fact of an illegal stay. When using standard forms for decisions related to return, namely return decisions and, if issued, entry-ban decisions and decisions on removal, Member States should respect that principle and fully comply with all applicable provisions of this Directive.
- (7) The need for Community and bilateral readmission agreements with third countries to facilitate the return process is underlined. International cooperation with countries of origin at all stages of the return process is a prerequisite to achieving sustainable return.
- (8) It is recognised that it is legitimate for Member States to return illegally staying third-country nationals, provided that fair and efficient asylum systems are in place which fully respect the principle of non-refoulement.
- (9) In accordance with Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2], a third-country national who has applied for asylum in a Member State should not be regarded as staying illegally on the territory of that Member State until a negative decision on the application, or a decision ending his or her right of stay as asylum seeker has entered into force.
- (10) Where there are no reasons to believe that this would undermine the purpose of a return procedure, voluntary return should be preferred over forced return and a period for voluntary departure should be granted. An extension of the period for voluntary departure should be provided for when considered necessary because of the specific circumstances of an individual case. In order to promote voluntary return, Member States should provide for enhanced return assistance and counselling and make best use of the relevant funding possibilities offered under the European Return Fund.
- (11) A common minimum set of legal safeguards on decisions related to return should be established to guarantee effective protection of the interests of the individuals concerned. The necessary legal aid should be made available to those who lack sufficient resources. Member States should provide in their national legislation for which cases legal aid is to be considered necessary.

(12) The situation of third-country nationals who are staying illegally but who cannot yet be removed should be addressed. Their basic conditions of subsistence should be defined according to national legislation. In order to be able to demonstrate their specific situation in the event of administrative controls or checks, such persons should be provided with written confirmation of their situation. Member States should enjoy wide discretion concerning the form and format of the written confirmation and should also be able to include it in decisions related to return adopted under this Directive.

(13) The use of coercive measures should be expressly subject to the principles of proportionality and effectiveness with regard to the means used and objectives pursued. Minimum safeguards for the conduct of forced return should be established, taking into account Council Decision 2004/573/EC of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders [3]. Member States should be able to rely on various possibilities to monitor forced return.

(14) The effects of national return measures should be given a European dimension by establishing an entry ban prohibiting entry into and stay on the territory of all the Member States. The length of the entry ban should be determined with due regard to all relevant circumstances of an individual case and should not normally exceed five years. In this context, particular account should be taken of the fact that the third-country national concerned has already been the subject of more than one return decision or removal order or has entered the territory of a Member State during an entry ban.

(15) It should be for the Member States to decide whether or not the review of decisions related to return implies the power for the reviewing authority or body to substitute its own decision related to the return for the earlier decision.

(16) The use of detention for the purpose of removal should be limited and subject to the principle of proportionality with regard to the means used and objectives pursued. Detention is justified only to prepare the return or carry out the removal process and if the application of less coercive measures would not be sufficient.

(17) Third-country nationals in detention should be treated in a humane and dignified manner with respect for their fundamental rights and in compliance with international and national law. Without prejudice to the initial apprehension by law-enforcement authorities, regulated by national legislation, detention should, as a rule, take place in specialised detention facilities.

(18) Member States should have rapid access to information on entry bans issued by other Member States. This information sharing should take place in accordance with Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II) [4].

(19) Cooperation between the institutions involved at all levels in the return process and the exchange and promotion of best practices should accompany the implementation of this Directive and provide European added value.

(20) Since the objective of this Directive, namely to establish common rules concerning return, removal, use of coercive measures, detention and entry bans, cannot be sufficiently achieved by the Member States and can therefore, by reason of its scale and effects, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary to achieve that objective.

(21) Member States should implement this Directive without discrimination on the basis of sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinions, membership of a national minority, property, birth, disability, age or sexual orientation.

(22) In line with the 1989 United Nations Convention on the Rights of the Child, the "best interests of the child" should be a primary consideration of Member States when implementing this Directive. In line with the European Convention for the Protection of Human Rights and Fundamental Freedoms, respect for family life should be a primary consideration of Member States when implementing this Directive.

(23) Application of this Directive is without prejudice to the obligations resulting from the Geneva Convention relating to the Status of Refugees of 28 July 1951, as amended by the New York Protocol of 31 January 1967.

(24) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.

(25) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application. Given that this Directive builds — to the extent that it applies to third-country nationals who do not fulfil or who no longer fulfil the conditions of entry in accordance with the Schengen Borders Code [5] — upon the Schengen acquis under the provisions of Title IV of Part Three of the Treaty establishing the European Community, Denmark shall, in accordance with Article 5 of the said Protocol, decide, within a period of six months after the adoption of this Directive, whether it will implement it in its national law.

(26) To the extent that it applies to third-country nationals who do not fulfil or who no longer fulfil the conditions of entry in accordance with the Schengen Borders Code, this Directive constitutes a development of provisions of the Schengen acquis in which the United Kingdom does not take part, in accordance with Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis [6]; moreover, in accordance with Articles 1 and 2 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and to the Treaty establishing the European Community, and without prejudice to Article 4 of the said Protocol, the United Kingdom is not taking part in the adoption of this Directive and is therefore not bound by it in its entirety or subject to its application.

(27) To the extent that it applies to third-country nationals who do not fulfil or who no longer fulfil the conditions of entry in accordance with the Schengen Borders Code, this Directive constitutes a development of provisions of the Schengen acquis in which Ireland does not take part, in accordance with Council Decision 2002/192/EC of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen acquis [7]; moreover, in accordance with Articles 1 and 2 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and to the Treaty establishing the European Community, and without prejudice to Article 4 of the said Protocol, Ireland is not taking part in the adoption of this Directive and is therefore not bound by it in its entirety or subject to its application.

(28) As regards Iceland and Norway, this Directive constitutes — to the extent that it applies to third-country nationals who do not fulfil or who no longer fulfil the conditions of entry in accordance with the Schengen Borders Code — a development of provisions of the Schengen acquis within the meaning of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those

two States with the implementation, application and development of the Schengen acquis, which fall within the area referred to in Article 1, point C, of Council Decision 1999/437/EC [8] on certain arrangements for the application of that Agreement.

(29) As regards Switzerland, this Directive constitutes — to the extent that it applies to third-country nationals who do not fulfil or who no longer fulfil the conditions of entry in accordance with the Schengen Borders Code — a development of provisions of the Schengen acquis within the meaning of the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis, which fall within the area referred to in Article 1, point C, of Decision 1999/437/EC read in conjunction with Article 3 of Council Decision 2008/146/EC [9] on the conclusion, on behalf of the European Community, of that Agreement.

(30) As regards Liechtenstein, this Directive constitutes — to the extent that it applies to third-country nationals who do not fulfil or who no longer fulfil the conditions of entry in accordance with the Schengen Borders Code — a development of provisions of the Schengen acquis within the meaning of the Protocol between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis, which fall within the area referred to in Article 1, point C, of Decision 1999/437/EC read in conjunction with Article 3 of Council Decision 2008/261/EC [10] on the signature, on behalf of the European Community, and on the provisional application of, certain provisions of that Protocol,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

GENERAL PROVISIONS

Article 1

Subject matter

This Directive sets out common standards and procedures to be applied in Member States for returning illegally staying third-country nationals, in accordance with fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations.

Article 2

Scope

1. This Directive applies to third-country nationals staying illegally on the territory of a Member State.
2. Member States may decide not to apply this Directive to third-country nationals who:
 - (a) are subject to a refusal of entry in accordance with Article 13 of the Schengen Borders Code, or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State;
 - (b) are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures.
3. This Directive shall not apply to persons enjoying the Community right of free movement as defined in Article 2(5) of the Schengen Borders Code.

Article 3

Definitions

For the purpose of this Directive the following definitions shall apply:

1. "third-country national" means any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty and who is not a person enjoying the Community right of free movement, as defined in Article 2(5) of the Schengen Borders Code;
2. "illegal stay" means the presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State;
3. "return" means the process of a third-country national going back — whether in voluntary compliance with an obligation to return, or enforced — to:
 - his or her country of origin, or
 - a country of transit in accordance with Community or bilateral readmission agreements or other arrangements, or
 - another third country, to which the third-country national concerned voluntarily decides to return and in which he or she will be accepted;
4. "return decision" means an administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing or stating an obligation to return;
5. "removal" means the enforcement of the obligation to return, namely the physical transportation out of the Member State;
6. "entry ban" means an administrative or judicial decision or act prohibiting entry into and stay on the territory of the Member States for a specified period, accompanying a return decision;
7. "risk of absconding" means the existence of reasons in an individual case which are based on objective criteria defined by law to believe that a third-country national who is the subject of return procedures may abscond;
8. "voluntary departure" means compliance with the obligation to return within the time-limit fixed for that purpose in the return decision;
9. "vulnerable persons" means minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.

Article 4

More favourable provisions

1. This Directive shall be without prejudice to more favourable provisions of:
 - (a) bilateral or multilateral agreements between the Community or the Community and its Member States and one or more third countries;
 - (b) bilateral or multilateral agreements between one or more Member States and one or more third countries.
2. This Directive shall be without prejudice to any provision which may be more favourable for the third-country national, laid down in the Community acquis relating to immigration and asylum.

3. This Directive shall be without prejudice to the right of the Member States to adopt or maintain provisions that are more favourable to persons to whom it applies provided that such provisions are compatible with this Directive.

4. With regard to third-country nationals excluded from the scope of this Directive in accordance with Article 2(2)(a), Member States shall:

(a) ensure that their treatment and level of protection are no less favourable than as set out in Article 8(4) and (5) (limitations on use of coercive measures), Article 9(2)(a) (postponement of removal), Article 14(1) (b) and (d) (emergency health care and taking into account needs of vulnerable persons), and Articles 16 and 17 (detention conditions) and

(b) respect the principle of non-refoulement.

Article 5

Non-refoulement, best interests of the child, family life and state of health

When implementing this Directive, Member States shall take due account of:

(a) the best interests of the child;

(b) family life;

(c) the state of health of the third-country national concerned, and respect the principle of non-refoulement.

CHAPTER II

TERMINATION OF ILLEGAL STAY

Article 6

Return decision

1. Member States shall issue a return decision to any third-country national staying illegally on their territory, without prejudice to the exceptions referred to in paragraphs 2 to 5.

2. Third-country nationals staying illegally on the territory of a Member State and holding a valid residence permit or other authorisation offering a right to stay issued by another Member State shall be required to go to the territory of that other Member State immediately. In the event of non-compliance by the third-country national concerned with this requirement, or where the third-country national's immediate departure is required for reasons of public policy or national security, paragraph 1 shall apply.

3. Member States may refrain from issuing a return decision to a third-country national staying illegally on their territory if the third-country national concerned is taken back by another Member State under bilateral agreements or arrangements existing on the date of entry into force of this Directive. In such a case the Member State which has taken back the third-country national concerned shall apply paragraph 1.

4. Member States may at any moment decide to grant an autonomous residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory. In that event no return decision shall be issued. Where a return decision has already been issued, it shall be withdrawn or suspended for the duration of validity of the residence permit or other authorisation offering a right to stay.

5. If a third-country national staying illegally on the territory of a Member State is the subject of a pending procedure for renewing his or her residence permit or other authorisation offering a

right to stay, that Member State shall consider refraining from issuing a return decision, until the pending procedure is finished, without prejudice to paragraph 6.

6. This Directive shall not prevent Member States from adopting a decision on the ending of a legal stay together with a return decision and/or a decision on a removal and/or entry ban in a single administrative or judicial decision or act as provided for in their national legislation, without prejudice to the procedural safeguards available under Chapter III and under other relevant provisions of Community and national law.

Article 7

Voluntary departure

1. A return decision shall provide for an appropriate period for voluntary departure of between seven and thirty days, without prejudice to the exceptions referred to in paragraphs 2 and 4. Member States may provide in their national legislation that such a period shall be granted only following an application by the third-country national concerned. In such a case, Member States shall inform the third-country nationals concerned of the possibility of submitting such an application.

The time period provided for in the first subparagraph shall not exclude the possibility for the third-country nationals concerned to leave earlier.

2. Member States shall, where necessary, extend the period for voluntary departure by an appropriate period, taking into account the specific circumstances of the individual case, such as the length of stay, the existence of children attending school and the existence of other family and social links.

3. Certain obligations aimed at avoiding the risk of absconding, such as regular reporting to the authorities, deposit of an adequate financial guarantee, submission of documents or the obligation to stay at a certain place may be imposed for the duration of the period for voluntary departure.

4. If there is a risk of absconding, or if an application for a legal stay has been dismissed as manifestly unfounded or fraudulent, or if the person concerned poses a risk to public policy, public security or national security, Member States may refrain from granting a period for voluntary departure, or may grant a period shorter than seven days.

Article 8

Removal

1. Member States shall take all necessary measures to enforce the return decision if no period for voluntary departure has been granted in accordance with Article 7(4) or if the obligation to return has not been complied with within the period for voluntary departure granted in accordance with Article 7.

2. If a Member State has granted a period for voluntary departure in accordance with Article 7, the return decision may be enforced only after the period has expired, unless a risk as referred to in Article 7(4) arises during that period.

3. Member States may adopt a separate administrative or judicial decision or act ordering the removal.

4. Where Member States use — as a last resort — coercive measures to carry out the removal of a third-country national who resists removal, such measures shall be proportionate and shall not exceed reasonable force. They shall be implemented as provided for in national legislation in accordance with fundamental rights and with due respect for the dignity and physical integrity of the third-country national concerned.

5. In carrying out removals by air, Member States shall take into account the Common Guidelines on security provisions for joint removals by air annexed to Decision 2004/573/EC.

6. Member States shall provide for an effective forced-return monitoring system.

Article 9

Postponement of removal

1. Member States shall postpone removal:

(a) when it would violate the principle of non-refoulement, or

(b) for as long as a suspensory effect is granted in accordance with Article 13(2).

2. Member States may postpone removal for an appropriate period taking into account the specific circumstances of the individual case. Member States shall in particular take into account:

(a) the third-country national's physical state or mental capacity;

(b) technical reasons, such as lack of transport capacity, or failure of the removal due to lack of identification.

3. If a removal is postponed as provided for in paragraphs 1 and 2, the obligations set out in Article 7(3) may be imposed on the third-country national concerned.

Article 10

Return and removal of unaccompanied minors

1. Before deciding to issue a return decision in respect of an unaccompanied minor, assistance by appropriate bodies other than the authorities enforcing return shall be granted with due consideration being given to the best interests of the child.

2. Before removing an unaccompanied minor from the territory of a Member State, the authorities of that Member State shall be satisfied that he or she will be returned to a member of his or her family, a nominated guardian or adequate reception facilities in the State of return.

Article 11

Entry ban

1. Return decisions shall be accompanied by an entry ban:

(a) if no period for voluntary departure has been granted, or

(b) if the obligation to return has not been complied with.

In other cases return decisions may be accompanied by an entry ban.

2. The length of the entry ban shall be determined with due regard to all relevant circumstances of the individual case and shall not in principle exceed five years. It may however exceed five years if the third-country national represents a serious threat to public policy, public security or national security.

3. Member States shall consider withdrawing or suspending an entry ban where a third-country national who is the subject of an entry ban issued in accordance with paragraph 1, second subparagraph, can demonstrate that he or she has left the territory of a Member State in full compliance with a return decision.

Victims of trafficking in human beings who have been granted a residence permit pursuant to Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an

action to facilitate illegal immigration, who cooperate with the competent authorities [11] shall not be subject of an entry ban without prejudice to paragraph 1, first subparagraph, point (b), and provided that the third-country national concerned does not represent a threat to public policy, public security or national security.

Member States may refrain from issuing, withdraw or suspend an entry ban in individual cases for humanitarian reasons.

Member States may withdraw or suspend an entry ban in individual cases or certain categories of cases for other reasons.

4. Where a Member State is considering issuing a residence permit or other authorisation offering a right to stay to a third-country national who is the subject of an entry ban issued by another Member State, it shall first consult the Member State having issued the entry ban and shall take account of its interests in accordance with Article 25 of the Convention implementing the Schengen Agreement [12].

5. Paragraphs 1 to 4 shall apply without prejudice to the right to international protection, as defined in Article 2(a) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [13], in the Member States.

CHAPTER III

PROCEDURAL SAFEGUARDS

Article 12

Form

1. Return decisions and, if issued, entry-ban decisions and decisions on removal shall be issued in writing and give reasons in fact and in law as well as information about available legal remedies.

The information on reasons in fact may be limited where national law allows for the right to information to be restricted, in particular in order to safeguard national security, defence, public security and for the prevention, investigation, detection and prosecution of criminal offences.

2. Member States shall provide, upon request, a written or oral translation of the main elements of decisions related to return, as referred to in paragraph 1, including information on the available legal remedies in a language the third-country national understands or may reasonably be presumed to understand.

3. Member States may decide not to apply paragraph 2 to third country nationals who have illegally entered the territory of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State.

In such cases decisions related to return, as referred to in paragraph 1, shall be given by means of a standard form as set out under national legislation.

Member States shall make available generalised information sheets explaining the main elements of the standard form in at least five of those languages which are most frequently used or understood by illegal migrants entering the Member State concerned.

Article 13

Remedies

1. The third-country national concerned shall be afforded an effective remedy to appeal against or seek review of decisions related to return, as referred to in Article 12(1), before a competent

judicial or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence.

2. The authority or body mentioned in paragraph 1 shall have the power to review decisions related to return, as referred to in Article 12(1), including the possibility of temporarily suspending their enforcement, unless a temporary suspension is already applicable under national legislation.

3. The third-country national concerned shall have the possibility to obtain legal advice, representation and, where necessary, linguistic assistance.

4. Member States shall ensure that the necessary legal assistance and/or representation is granted on request free of charge in accordance with relevant national legislation or rules regarding legal aid, and may provide that such free legal assistance and/or representation is subject to conditions as set out in Article 15(3) to (6) of Directive 2005/85/EC.

Article 14

Safeguards pending return

1. Member States shall, with the exception of the situation covered in Articles 16 and 17, ensure that the following principles are taken into account as far as possible in relation to third-country nationals during the period for voluntary departure granted in accordance with Article 7 and during periods for which removal has been postponed in accordance with Article 9:

- (a) family unity with family members present in their territory is maintained;
- (b) emergency health care and essential treatment of illness are provided;
- (c) minors are granted access to the basic education system subject to the length of their stay;
- (d) special needs of vulnerable persons are taken into account.

2. Member States shall provide the persons referred to in paragraph 1 with a written confirmation in accordance with national legislation that the period for voluntary departure has been extended in accordance with Article 7(2) or that the return decision will temporarily not be enforced.

CHAPTER IV

DETENTION FOR THE PURPOSE OF REMOVAL

Article 15

Detention

1. Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when:

- (a) there is a risk of absconding or
- (b) the third-country national concerned avoids or hampers the preparation of return or the removal process.

Any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence.

2. Detention shall be ordered by administrative or judicial authorities.

Detention shall be ordered in writing with reasons being given in fact and in law.

When detention has been ordered by administrative authorities, Member States shall:

(a) either provide for a speedy judicial review of the lawfulness of detention to be decided on as speedily as possible from the beginning of detention;

(b) or grant the third-country national concerned the right to take proceedings by means of which the lawfulness of detention shall be subject to a speedy judicial review to be decided on as speedily as possible after the launch of the relevant proceedings. In such a case Member States shall immediately inform the third-country national concerned about the possibility of taking such proceedings.

The third-country national concerned shall be released immediately if the detention is not lawful.

3. In every case, detention shall be reviewed at reasonable intervals of time either on application by the third-country national concerned or ex officio. In the case of prolonged detention periods, reviews shall be subject to the supervision of a judicial authority.

4. When it appears that a reasonable prospect of removal no longer exists for legal or other considerations or the conditions laid down in paragraph 1 no longer exist, detention ceases to be justified and the person concerned shall be released immediately.

5. Detention shall be maintained for as long a period as the conditions laid down in paragraph 1 are fulfilled and it is necessary to ensure successful removal. Each Member State shall set a limited period of detention, which may not exceed six months.

6. Member States may not extend the period referred to in paragraph 5 except for a limited period not exceeding a further twelve months in accordance with national law in cases where regardless of all their reasonable efforts the removal operation is likely to last longer owing to:

(a) a lack of cooperation by the third-country national concerned, or

(b) delays in obtaining the necessary documentation from third countries.

Article 16

Conditions of detention

1. Detention shall take place as a rule in specialised detention facilities. Where a Member State cannot provide accommodation in a specialised detention facility and is obliged to resort to prison accommodation, the third-country nationals in detention shall be kept separated from ordinary prisoners.

2. Third-country nationals in detention shall be allowed — on request — to establish in due time contact with legal representatives, family members and competent consular authorities.

3. Particular attention shall be paid to the situation of vulnerable persons. Emergency health care and essential treatment of illness shall be provided.

4. Relevant and competent national, international and non-governmental organisations and bodies shall have the possibility to visit detention facilities, as referred to in paragraph 1, to the extent that they are being used for detaining third-country nationals in accordance with this Chapter. Such visits may be subject to authorisation.

5. Third-country nationals kept in detention shall be systematically provided with information which explains the rules applied in the facility and sets out their rights and obligations. Such information shall include information on their entitlement under national law to contact the organisations and bodies referred to in paragraph 4.

Article 17

Detention of minors and families

1. Unaccompanied minors and families with minors shall only be detained as a measure of last resort and for the shortest appropriate period of time.
2. Families detained pending removal shall be provided with separate accommodation guaranteeing adequate privacy.
3. Minors in detention shall have the possibility to engage in leisure activities, including play and recreational activities appropriate to their age, and shall have, depending on the length of their stay, access to education.
4. Unaccompanied minors shall as far as possible be provided with accommodation in institutions provided with personnel and facilities which take into account the needs of persons of their age.
5. The best interests of the child shall be a primary consideration in the context of the detention of minors pending removal.

Article 18

Emergency situations

1. In situations where an exceptionally large number of third-country nationals to be returned places an unforeseen heavy burden on the capacity of the detention facilities of a Member State or on its administrative or judicial staff, such a Member State may, as long as the exceptional situation persists, decide to allow for periods for judicial review longer than those provided for under the third subparagraph of Article 15(2) and to take urgent measures in respect of the conditions of detention derogating from those set out in Articles 16(1) and 17(2).
2. When resorting to such exceptional measures, the Member State concerned shall inform the Commission. It shall also inform the Commission as soon as the reasons for applying these exceptional measures have ceased to exist.
3. Nothing in this Article shall be interpreted as allowing Member States to derogate from their general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under this Directive.

CHAPTER V

FINAL PROVISIONS

Article 19

Reporting

The Commission shall report every three years to the European Parliament and the Council on the application of this Directive in the Member States and, if appropriate, propose amendments.

The Commission shall report for the first time by 24 December 2013 and focus on that occasion in particular on the application of Article 11, Article 13(4) and Article 15 in Member States. In relation to Article 13(4) the Commission shall assess in particular the additional financial and administrative impact in Member States.

Article 20

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 24 December 2010. In relation to Article 13(4), Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 24 December 2011. They shall forthwith communicate to the Commission the text of those measures.

When Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 21

Relationship with the Schengen Convention

This Directive replaces the provisions of Articles 23 and 24 of the Convention implementing the Schengen Agreement.

Article 22

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

Article 23

Addressees

This Directive is addressed to the Member States in accordance with the Treaty establishing the European Community.

Done at Strasbourg, 16 December 2008.

For the European Parliament, The President, H.-G. Pöttering

For the Council, The President, B. Le Maire

[1] Opinion of the European Parliament of 18 June 2008 (not yet published in the Official Journal) and Council Decision of 9 December 2008.

[2] OJ L 326, 13.12.2005, p. 13.

[3] OJ L 261, 6.8.2004, p. 28.

[4] OJ L 381, 28.12.2006, p. 4.

[5] Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ L 105, 13.4.2006, p. 1).

[6] OJ L 131, 1.6.2000, p. 43.

[7] OJ L 64, 7.3.2002, p. 20.

[8] OJ L 176, 10.7.1999, p. 31.

[9] OJ L 53, 27.2.2008, p. 1.

[10] OJ L 83, 26.3.2008, p. 3.

[11] OJ L 261, 6.8.2004, p. 19.

[12] OJ L 239, 22.9.2000, p. 19.

[13] OJ L 304, 30.9.2004, p. 12.

Appendix 7: Text of the EP's resolution on SWIFT (September 2009)

European Parliament resolution of 17 September 2009 on the envisaged international agreement to make available to the United States Treasury Department financial payment messaging data to prevent and combat terrorism and terrorist financing

The European Parliament,

- having regard to Article 6(2) of the Treaty on European Union and Article 286 of the EC Treaty,
- having regard to Articles 95 and 300 of the EC Treaty,
- having regard to the European Convention on Human Rights, in particular Articles 5, 6, 7 and 8 thereof,
- having regard to the Charter of Fundamental Rights of the European Union, in particular Articles 7, 8, 47, 48 and 49 thereof,
- having regard to Council of Europe Convention No 108 for the Protection of Individuals with regard to Automatic Processing of Personal Data,
- having regard to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data⁽¹⁾,
- having regard to Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data⁽²⁾,
- having regard to Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing⁽³⁾ and Regulation (EC) No 1781/2006 of the European Parliament and of the Council of 15 November 2006 on information on the payer accompanying transfers of funds⁽⁴⁾,
- having regard to the Agreement on mutual legal assistance between the European Union and the United States of America of 25 June 2003, in particular Article 4 thereof (on identification of bank information⁽⁵⁾),
- having regard to the US Terrorist Finance Tracking Program (TFTP) based on US Presidential Executive Order 13224⁽⁶⁾, which, in the event of a national emergency, authorises notably the US Treasury Department to obtain, by means of ‘administrative subpoenas’, sets of financial messaging data transiting over financial message networks such as the ones managed by the Society for Worldwide Interbank Financial Telecommunications (SWIFT),
- having regard to the conditions established by the US Treasury Department to access the SWIFT data (as defined by the US representations⁽⁷⁾) and taking account of the information obtained by the Commission via the ‘eminent person’ on the US authorities’ compliance with the representations referred to above,
- having regard to its previous resolutions inviting SWIFT to comply strictly with the EU legal framework, notably when European financial transactions take place on EU territory⁽⁸⁾,
- having regard to the negotiating directives for the Presidency of the Council and the envisaged international agreement between the EU and the US on the transfer of SWIFT data, which have been classified ‘EU Restricted’,
- having regard to the opinion of the European Data Protection Supervisor of 3 July 2009, which has been classified ‘EU Restricted’,
- having regard to Rule 110(2) of its Rules of Procedure,

A. whereas SWIFT announced in October 2007 a new messaging structure to be operational by the end of 2009,

B. whereas this change in messaging structure would have the consequence that the majority of the financial data that SWIFT had thus far been subpoenaed to transfer to the US Treasury Department's TFTP would no longer be made available to the TFTP,

C. whereas on 27 July 2009 the Council unanimously adopted the negotiating directives for the negotiation by the Presidency, assisted by the Commission, of an international agreement with the US, on the basis of Articles 24 and 38 of the Treaty on European Union, to continue the transfer of SWIFT data to the US TFTP,

D. whereas the negotiating directives, together with the legal opinion on the choice of legal basis issued by the Council's Legal Service, have not been made public, since they are classified 'EU Restricted',

E. whereas the international agreement will provide for provisional and immediate application from the time of signature until entry into force of the agreement,

F. whereas the EU itself does not have a TFTP in place,

G. whereas access to data managed by SWIFT makes it potentially possible to detect not only transfers linked to illegal activities but also information on the economic activities of the individuals and countries concerned, and could thus be misused for large-scale forms of economic and industrial espionage,

H. whereas SWIFT concluded with the United States Treasury Department a memorandum of understanding which narrowed the scope of data transferred and confined the scope of data searches to specific counter-terrorism cases, and subjected such transfers and searches to independent oversight and audit, including real-time monitoring,

I. whereas any EU-US agreement must be conditional upon maintaining the protection which exists in the memorandum of understanding and the US Treasury representations, such as those that apply in the case of data subpoenaed from SWIFT's US operating centre by the US Treasury Department,

1. Recalls its determination to fight terrorism and its firm belief in the need to strike the right balance between security measures and the protection of civil liberties and fundamental rights, while ensuring the utmost respect for privacy and data protection; reaffirms that necessity and proportionality are key principles without which the fight against terrorism will never be effective;

2. Stresses that the European Union is based on the rule of law and that all transfers of European personal data to third countries for security purposes should respect procedural guarantees and defence rights and comply with data-protection legislation at national and European level⁽⁹⁾;

3. Reminds the Council and the Commission that, within the transatlantic framework of the EU-US agreement on legal assistance, which will enter into force on 1 January 2010, Article 4 provides for access to be granted to targeted financial data upon request, through national state authorities, and that this might constitute a sounder legal basis for the transfer of SWIFT data than the proposed interim agreement, and asks the Council and the Commission to explain the need for an interim agreement;

4. Welcomes SWIFT's decision in June 2007 to relocate all intra-EU financial transfer data to two European operating centres; draws the Council's attention to the fact that this decision was taken in accordance with the Belgian Data Protection Authority and the request from the EU's Article 29 Working Party and in line with the view expressed by the European Parliament;

5. Notes that the Council did not adopt the negotiation directives until almost two years after SWIFT announced the change in messaging structure;

6. Is concerned that, with respect to the legal basis chosen for this envisaged agreement, the legal services of the institutions have expressed divergent opinions, and notes that the Council's Legal Service is of the opinion that it is a Community competence;

7. Believes, to the extent that an international agreement is absolutely necessary, that it must as a very minimum ensure:

(a) that data are transferred and processed only for the purposes of fighting terrorism, as defined in Article 1 of Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism⁽¹⁰⁾, and that they relate to individuals or terrorist organisations recognised as such also by the EU;

(b) that the processing of such data as regards their transfer (only by means of a 'push' system), storage and use is not disproportionate to the objective for which those data have been transferred and are subsequently processed;

(c) that the transfer requests are based on specific, targeted cases, limited in time and subject to judicial authorisation, and that any subsequent processing is limited to data which disclose a link with persons or organisations under examination in the US; that data which do not disclose such links are erased;

(d) that EU citizens and enterprises are granted the same defence rights and procedural guarantees and the same right of access to justice as exist in the EU and that the legality and proportionality of the transfer requests are open to judicial review in the US;

(e) that transferred data are subject to the same judicial redress mechanisms as would apply to data held within the EU, including compensation in the event of unlawful processing of personal data;

(f) that the agreement prohibits any use of SWIFT data by US authorities for purposes other than those linked to terrorism financing, and that the transfer of such data to third parties other than the public authorities in charge of the fight against terrorism financing is also prohibited;

(g) that a reciprocity mechanism is strictly adhered to, obliging the competent US authorities to transfer relevant financial messaging data to the competent EU authorities, upon request;

(h) that the agreement is expressly set up for an intermediate period by means of a sunset clause not exceeding 12 months, and without prejudice to the procedure to be followed under the Lisbon Treaty for the possible conclusion of a new agreement in this field;

(i) that the interim agreement clearly provides for the US authorities to be notified forthwith after the entry into force of the Lisbon Treaty and that a possible new agreement will be negotiated under the new EU legal framework that fully involves the European Parliament and national parliaments;

8. Requests the Council and the Commission to clarify the precise role of the 'public authority' to be designated with responsibility to receive requests from the US Treasury Department, taking into account in particular the nature of the powers vested in such an 'authority' and the way in which such powers could be enforced;

9. Requests the Council and the Commission to confirm that batches and large files such as those concerning transactions relating to the Single European Payment Area (SEPA) fall outside the scope of the data to be requested by or transferred to the US Treasury Department;

10. Stresses that SWIFT is a key infrastructure for the resilience of Europe's payment systems and securities markets and should be not be unfairly disadvantaged vis-à-vis competing financial message providers;

11. Underlines the importance of legal certainty and immunity for citizens and private organisations subject to data transfers under such arrangements as the proposed EU-US agreement;
 12. Notes that it may be useful for the Commission to evaluate the necessity of setting up a European TFTP;
 13. Requests the Commission and the Presidency to ensure that the European Parliament and all national parliaments will be given full access to the negotiation documents and directives;
 14. Instructs its President to forward this resolution to the Council, the Commission, the European Central Bank, the governments and parliaments of the Member States and candidate countries, and the United States Government and the two Chambers of Congress.
- (1) OJ L 281, 23.11.1995, p. 31.
 - (2) OJ L 8, 12.1.2001, p. 1.
 - (3) OJ L 309, 25.11.2005, p. 15.
 - (4) OJ L 345, 8.12.2006, p. 1.
 - (5) OJ L 181, 19.7.2003, p. 34.
 - (6) Executive Order 13224 was issued by President Bush on September 23, 2001, pursuant to the International Emergency Economic Powers Act, 50 USC, sections 1701-1706. The President delegated his authority under the Executive Order to the Secretary of the Treasury. The Treasury issued the subpoenas to SWIFT pursuant to Executive Order 13224 and its implementing regulations.
 - (7) Processing of EU originating Personal Data by United States Treasury Department for Counter Terrorism Purposes – "SWIFT" (OJ C 166, 20.7.2007, p. 18).
 - (8) Resolution of 14 February 2007 on SWIFT, the PNR agreement and the transatlantic dialogue on these issues (OJ C 287 E, 29.11.2007, p. 349); resolution of 6 July 2006 on the interception of bank transfer data from the SWIFT system by the US secret services (OJ C 303 E, 13.12.2006, p. 843).
 - (9) Notably the European Convention on Human Rights, in particular Articles 5, 6, 7 and 8 thereof, the Charter of Fundamental Rights, in particular Articles 7, 8, 47, 48 and 49 thereof, Council of Europe Convention No 108 for the Protection of Individuals with regard to Automatic Processing of Personal Data, Directive 95/46/EC and Regulation (EC) No 45/2001.
 - (10) OJ L 164, 22.6.2002, p. 3.

Appendix 8: Text of the SWIFT Agreement

Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program

Official Journal L 195 , 27/07/2010 P. 5 - 14

THE EUROPEAN UNION, of the one part, and THE UNITED STATES OF AMERICA, of the other part,

Together hereinafter referred to as "the Parties",

DESIRING to prevent and combat terrorism and its financing, in particular by mutual sharing of information, as a means of protecting their respective democratic societies and common values, rights, and freedoms;

SEEKING to enhance and encourage cooperation between the Parties in the spirit of transatlantic partnership;

RECALLING the United Nations conventions for combating terrorism and its financing, and relevant resolutions of the United Nations Security Council in the field of fighting terrorism, in particular United Nations Security Council Resolution 1373 (2001) and its directives that all

States shall take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information; that States shall afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts; that States should find ways of intensifying and accelerating the exchange of operational information; that States should exchange information in accordance with international and domestic law; and that States should cooperate, particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks and to take action against perpetrators of such attacks;

RECOGNISING that the United States Department of the Treasury's (U.S. Treasury Department) Terrorist Finance Tracking Program (TFTP) has been instrumental in identifying and capturing terrorists and their financiers and has generated many leads that have been disseminated for counter terrorism purposes to competent authorities around the world, with particular value for European Union Member States (Member States);

NOTING the importance of the TFTP in preventing and combating terrorism and its financing in the European Union and elsewhere, and the important role of the European Union in ensuring that designated providers of international financial payment messaging services provide financial payment messaging data stored in the territory of the European Union which are necessary for preventing and combating terrorism and its financing, subject to strict compliance with safeguards on privacy and the protection of personal data;

MINDFUL of Article 6(2) of the Treaty on European Union on respect for fundamental rights, the right to privacy with regard to the processing of personal data as stipulated in Article 16 of the Treaty on the Functioning of the European Union, the principles of proportionality and necessity concerning the right to private and family life, the respect for privacy, and the protection of personal data under Article 8(2) of the European Convention on the Protection of Human Rights and Fundamental Freedoms, Council of Europe Convention No 108 for the Protection of Individuals with regard to Automatic Processing of Personal Data, and Articles 7 and 8 of the Charter of Fundamental Rights of the European Union;

MINDFUL of the breadth of privacy protections in the United States of America (United States), as reflected in the United States Constitution, and in its criminal and civil legislation, regulations, and long-standing policies, which are enforced and maintained by checks and balances applied by the three branches of government;

STRESSING the common values governing privacy and the protection of personal data in the European Union and the United States, including the importance which both Parties assign to due process and the right to seek effective remedies for improper government action;

MINDFUL of the mutual interest in the expeditious conclusion of a binding agreement between the European Union and the United States based on common principles regarding the protection of personal data when transferred for the general purposes of law enforcement, bearing in mind the importance of carefully considering its effect on prior agreements and the principle of effective administrative and judicial redress on a non-discriminatory basis;

NOTING the rigorous controls and safeguards utilised by the U.S. Treasury Department for the handling, use, and dissemination of financial payment messaging data pursuant to the TFTP, as described in the representations of the U.S. Treasury Department published in the Official Journal of the European Union on 20 July 2007 and the Federal Register of the United States on 23 October 2007, which reflect the ongoing cooperation between the United States and the European Union in the fight against global terrorism;

RECOGNISING the two comprehensive reviews and reports of the independent person appointed by the European Commission to verify compliance with the data protection

safeguards of the TFTP, concluding that the United States was complying with the data privacy protection practices outlined in its Representations and further that the TFTP has generated significant security benefits for the European Union and has been extremely valuable not only in investigating terrorist attacks but also in preventing a number of terrorist attacks in Europe and elsewhere;

MINDFUL of the European Parliament's resolution of 5 May 2010 on the Recommendation from the Commission to the Council to authorise the opening of negotiations for an agreement between the European Union and the United States to make available to the U.S. Treasury Department financial messaging data to prevent and combat terrorism and terrorist financing;

RECALLING that, to guarantee effective exercise of their rights, any person irrespective of nationality is able to lodge a complaint before an independent data protection authority, other similar authority, or independent and impartial court or tribunal, to seek effective remedies;

MINDFUL that non-discriminatory administrative and judicial redress is available under U.S. law for the mishandling of personal data, including under the Administrative Procedure Act of 1946, the Inspector General Act of 1978, the Implementing Recommendations of the 9/11 Commission Act of 2007, the Computer Fraud and Abuse Act, and the Freedom of Information Act;

RECALLING that by law within the European Union customers of financial institutions and of providers of financial payment messaging services are informed in writing that personal data contained in financial transaction records may be transferred to Member States' or third countries' public authorities for law enforcement purposes and that this notice may include information with respect to the TFTP;

RECOGNISING the principle of proportionality guiding this Agreement and implemented by both the European Union and the United States; in the European Union as derived from the European Convention on Human Rights and Fundamental Freedoms, its applicable jurisprudence, and EU and Member State legislation; and in the United States through reasonableness requirements derived from the United States Constitution and federal and state laws, and their interpretive jurisprudence, as well as through prohibitions on overbreadth of production orders and on arbitrary action by government officials;

AFFIRMING that this Agreement does not constitute a precedent for any future arrangements between the United States and the European Union, or between either of the Parties and any State, regarding the processing and transfer of financial payment messaging data or any other form of data, or regarding data protection;

RECOGNISING that Designated Providers are bound by generally applicable EU or national data protection rules, intended to protect individuals with regard to the processing of their personal data, under the supervision of competent Data Protection Authorities in a manner consistent with the specific provisions of this Agreement; and

FURTHER AFFIRMING that this Agreement is without prejudice to other law enforcement or information sharing agreements or arrangements between the Parties or between the United States and Member States,

HAVE AGREED AS FOLLOWS:

Article 1

Purpose of Agreement

1. The purpose of this Agreement is to ensure, with full respect for the privacy, protection of personal data, and other conditions set out in this Agreement, that:

(a) financial payment messages referring to financial transfers and related data stored in the territory of the European Union by providers of international financial payment messaging services, that are jointly designated pursuant to this Agreement, are provided to the U.S. Treasury Department for the exclusive purpose of the prevention, investigation, detection, or prosecution of terrorism or terrorist financing; and

(b) relevant information obtained through the TFTP is provided to law enforcement, public security, or counter terrorism authorities of Member States, or Europol or Eurojust, for the purpose of the prevention, investigation, detection, or prosecution of terrorism or terrorist financing.

2. The United States, the European Union, and its Member States shall take all necessary and appropriate measures within their authority to carry out the provisions and achieve the purpose of this Agreement.

Article 2

Scope of application

Conduct pertaining to terrorism or terrorist financing

This Agreement applies to the obtaining and use of financial payment messaging and related data with a view to the prevention, investigation, detection, or prosecution of:

(a) acts of a person or entity that involve violence, or are otherwise dangerous to human life or create a risk of damage to property or infrastructure, and which, given their nature and context, are reasonably believed to be committed with the aim of:

(i) intimidating or coercing a population;

(ii) intimidating, compelling, or coercing a government or international organisation to act or abstain from acting; or

(iii) seriously destabilising or destroying the fundamental political, constitutional, economic, or social structures of a country or an international organisation;

(b) a person or entity assisting, sponsoring, or providing financial, material, or technological support for, or financial or other services to or in support of, acts described in subparagraph (a);

(c) a person or entity providing or collecting funds, by any means, directly or indirectly, with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out any of the acts described in subparagraphs (a) or (b); or

(d) a person or entity aiding, abetting, or attempting acts described in subparagraphs (a), (b), or (c).

Article 3

Ensuring provision of data by Designated Providers

The Parties, jointly and individually, shall ensure, in accordance with this Agreement and in particular Article 4, that entities jointly designated by the Parties under this Agreement as providers of international financial payment messaging services (Designated Providers) provide to the U.S. Treasury Department requested financial payment messaging and related data which are necessary for the purpose of the prevention, investigation, detection, or prosecution of terrorism or terrorist financing (Provided Data). The Designated Providers shall be identified in the Annex to this Agreement and may be updated, as necessary, by exchange of diplomatic notes. Any amendments to the Annex shall be duly published in the Official Journal of the European Union.

Article 4

U.S. Requests to obtain data from Designated Providers

1. For the purposes of this Agreement, the U.S. Treasury Department shall serve production orders (Requests), under authority of U.S. law, upon a Designated Provider present in the territory of the United States in order to obtain data necessary for the purpose of the prevention, investigation, detection, or prosecution of terrorism or terrorist financing that are stored in the territory of the European Union.
2. The Request (together with any supplemental documents) shall:
 - (a) identify as clearly as possible the data, including the specific categories of data requested, that are necessary for the purpose of the prevention, investigation, detection, or prosecution of terrorism or terrorist financing;
 - (b) clearly substantiate the necessity of the data;
 - (c) be tailored as narrowly as possible in order to minimise the amount of data requested, taking due account of past and current terrorism risk analyses focused on message types and geography as well as perceived terrorism threats and vulnerabilities, geographic, threat, and vulnerability analyses; and
 - (d) not seek any data relating to the Single Euro Payments Area.
3. Upon service of the Request on the Designated Provider, the U.S. Treasury Department shall simultaneously provide a copy of the Request, with any supplemental documents, to Europol.
4. Upon receipt of the copy, Europol shall verify as a matter of urgency whether the Request complies with the requirements of paragraph 2. Europol shall notify the Designated Provider that it has verified that the Request complies with the requirements of paragraph 2.
5. For the purposes of this Agreement, once Europol has confirmed that the Request complies with the requirements of paragraph 2, the Request shall have binding legal effect as provided under U.S. law, within the European Union as well as the United States. The Designated Provider is thereby authorised and required to provide the data to the U.S. Treasury Department.
6. The Designated Provider shall thereupon provide the data (i.e., on a "push basis") directly to the U.S. Treasury Department. The Designated Provider shall keep a detailed log of all data transmitted to the U.S. Treasury Department for the purposes of this Agreement.
7. Once the data have been provided pursuant to these procedures, the Designated Provider shall be deemed to have complied with this Agreement and with all other applicable legal requirements in the European Union related to the transfer of such data from the European Union to the United States.
8. Designated Providers shall have all administrative and judicial redress available under U.S. law to recipients of U.S. Treasury Department Requests.
9. The Parties shall jointly coordinate with regard to the technical modalities necessary to support the Europol verification process.

Article 5

Safeguards applicable to the processing of Provided Data

General obligations

1. The U.S. Treasury Department shall ensure that Provided Data are processed in accordance with the provisions of this Agreement. The U.S. Treasury Department shall ensure the protection of personal data by means of the following safeguards, which shall be applied without discrimination, in particular on the basis of nationality or country of residence.

2. Provided Data shall be processed exclusively for the prevention, investigation, detection, or prosecution of terrorism or its financing.

3. The TFTP does not and shall not involve data mining or any other type of algorithmic or automated profiling or computer filtering.

Data security and integrity

4. To prevent unauthorised access to or disclosure or loss of the data or any unauthorised form of processing:

(a) Provided Data shall be held in a secure physical environment, stored separately from any other data, and maintained with high-level systems and physical intrusion controls;

(b) Provided Data shall not be interconnected with any other database;

(c) access to Provided Data shall be limited to analysts investigating terrorism or its financing and to persons involved in the technical support, management, and oversight of the TFTP;

(d) Provided Data shall not be subject to any manipulation, alteration, or addition; and

(e) no copies of Provided Data shall be made, other than for disaster recovery back-up purposes.

Necessary and proportionate processing of data

5. All searches of Provided Data shall be based upon pre-existing information or evidence which demonstrates a reason to believe that the subject of the search has a nexus to terrorism or its financing.

6. Each individual TFTP search of Provided Data shall be narrowly tailored, shall demonstrate a reason to believe that the subject of the search has a nexus to terrorism or its financing, and shall be logged, including such nexus to terrorism or its financing required to initiate the search.

7. Provided Data may include identifying information about the originator and/or recipient of a transaction, including name, account number, address, and national identification number. The Parties recognise the special sensitivity of personal data revealing racial or ethnic origin, political opinions, or religious or other beliefs, trade union membership, or health and sexual life (sensitive data). In the exceptional circumstance that extracted data were to include sensitive data, the U.S. Treasury Department shall protect such data in accordance with the safeguards and security measures set forth in this Agreement and with full respect and taking due account of their special sensitivity.

Article 6

Retention and deletion of data

1. During the term of this Agreement, the U.S. Treasury Department shall undertake an ongoing and at least annual evaluation to identify non-extracted data that are no longer necessary to combat terrorism or its financing. Where such data are identified, the U.S. Treasury Department shall permanently delete them as soon as technologically feasible.

2. If it transpires that financial payment messaging data were transmitted which were not requested, the U.S. Treasury Department shall promptly and permanently delete such data and shall inform the relevant Designated Provider.

3. Subject to any earlier deletion of data resulting from paragraphs 1, 2, or 5, all non-extracted data received prior to 20 July 2007 shall be deleted not later than 20 July 2012.

4. Subject to any earlier deletion of data resulting from paragraphs 1, 2, or 5, all non-extracted data received on or after 20 July 2007 shall be deleted not later than five (5) years from receipt.

5. During the term of this Agreement, the U.S. Treasury Department shall undertake an ongoing and at least annual evaluation to assess the data retention periods specified in paragraphs 3 and 4 to ensure that they continue to be no longer than necessary to combat terrorism or its financing. Where any such retention periods are determined to be longer than necessary to combat terrorism or its financing, the U.S. Treasury Department shall reduce such retention periods, as appropriate.

6. Not later than three years from the date of entry into force of this Agreement, the European Commission and the U.S. Treasury Department shall prepare a joint report regarding the value of TFTP Provided Data, with particular emphasis on the value of data retained for multiple years and relevant information obtained from the joint review conducted pursuant to Article 13. The Parties shall jointly determine the modalities of this report.

7. Information extracted from Provided Data, including information shared under Article 7, shall be retained for no longer than necessary for specific investigations or prosecutions for which they are used.

Article 7

Onward transfer

Onward transfer of information extracted from the Provided Data shall be limited pursuant to the following safeguards:

- (a) only information extracted as a result of an individualised search as described in this Agreement, in particular Article 5, shall be shared;
- (b) such information shall be shared only with law enforcement, public security, or counter terrorism authorities in the United States, Member States, or third countries, or with Europol or Eurojust, or other appropriate international bodies, within the remit of their respective mandates;
- (c) such information shall be shared for lead purposes only and for the exclusive purpose of the investigation, detection, prevention, or prosecution of terrorism or its financing;
- (d) where the U.S. Treasury Department is aware that such information involves a citizen or resident of a Member State, any sharing of the information with the authorities of a third country shall be subject to the prior consent of competent authorities of the concerned Member State or pursuant to existing protocols on such information sharing between the U.S. Treasury Department and that Member State, except where the sharing of the data is essential for the prevention of an immediate and serious threat to public security of a Party to this Agreement, a Member State, or a third country. In the latter case the competent authorities of the concerned Member State shall be informed of the matter at the earliest opportunity;
- (e) in sharing such information, the U.S. Treasury Department shall request that the information shall be deleted by the recipient authority as soon as it is no longer necessary for the purpose for which it was shared; and
- (f) each onward transfer shall be duly logged.

Article 8

Adequacy

Subject to ongoing compliance with the commitments on privacy and protection of personal data set out in this Agreement, the U.S. Treasury Department is deemed to ensure an adequate level of data protection for the processing of financial payment messaging and related data transferred from the European Union to the United States for the purposes of this Agreement.

Article 9

Spontaneous provision of information

1. The U.S. Treasury Department shall ensure the availability, as soon as practicable and in the most expedient manner, to law enforcement, public security, or counter terrorism authorities of concerned Member States, and, as appropriate, to Europol and Eurojust, within the remit of their respective mandates, of information obtained through the TFTP that may contribute to the investigation, prevention, detection, or prosecution by the European Union of terrorism or its financing. Any follow-on information that may contribute to the investigation, prevention, detection, or prosecution by the United States of terrorism or its financing shall be conveyed back to the United States on a reciprocal basis and in a reciprocal manner.
2. In order to facilitate the efficient exchange of information, Europol may designate a liaison officer to the U.S. Treasury Department. The modalities of the liaison officer's status and tasks shall be decided jointly by the Parties.

Article 10

EU requests for TFTP searches

Where a law enforcement, public security, or counter terrorism authority of a Member State, or Europol or Eurojust, determines that there is reason to believe that a person or entity has a nexus to terrorism or its financing as defined in Articles 1 to 4 of Council Framework Decision 2002/475/JHA, as amended by Council Framework Decision 2008/919/JHA and Directive 2005/60/EC, such authority may request a search for relevant information obtained through the TFTP. The U.S. Treasury Department shall promptly conduct a search in accordance with Article 5 and provide relevant information in response to such requests.

Article 11

Cooperation with future equivalent EU system

1. During the course of this Agreement, the European Commission will carry out a study into the possible introduction of an equivalent EU system allowing for a more targeted transfer of data.
2. If, following this study, the European Union decides to establish an EU system, the United States shall cooperate and provide assistance and advice to contribute to the effective establishment of such a system.
3. Since the establishment of an EU system could substantially change the context of this Agreement, if the European Union decides to establish such a system, the Parties should consult to determine whether this Agreement would need to be adjusted accordingly. In that regard, U.S. and EU authorities shall cooperate to ensure the complementariness and efficiencies of the U.S. and EU systems in a manner that further enhances the security of citizens of the United States, the European Union, and elsewhere. In the spirit of this cooperation, the Parties shall actively pursue, on the basis of reciprocity and appropriate safeguards, the cooperation of any relevant international financial payment messaging service providers which are based in their respective territories for the purposes of ensuring the continued and effective viability of the U.S. and EU systems.

Article 12

Monitoring of safeguards and controls

1. Compliance with the strict counter terrorism purpose limitation and the other safeguards set out in Articles 5 and 6 shall be subject to monitoring and oversight by independent overseers, including by a person appointed by the European Commission, with the agreement of and subject to appropriate security clearances by the United States. Such oversight shall include the authority to review in real time and retrospectively all searches made of the Provided Data, the

authority to query such searches and, as appropriate, to request additional justification of the terrorism nexus. In particular, independent overseers shall have the authority to block any or all searches that appear to be in breach of Article 5.

2. The oversight described in paragraph 1 shall be subject to regular monitoring, including of the independence of the oversight described in paragraph 1, in the framework of the review foreseen in Article 13. The Inspector General of the U.S. Treasury Department will ensure that the independent oversight described in paragraph 1 is undertaken pursuant to applicable audit standards.

Article 13

Joint review

1. At the request of one of the Parties and at any event after a period of six (6) months from the date of entry into force of this Agreement, the Parties shall jointly review the safeguards, controls, and reciprocity provisions set out in this Agreement. The review shall be conducted thereafter on a regular basis, with additional reviews scheduled as necessary.

2. The review shall have particular regard to (a) the number of financial payment messages accessed, (b) the number of occasions on which leads have been shared with Member States, third countries, and Europol and Eurojust, (c) the implementation and effectiveness of this Agreement, including the suitability of the mechanism for the transfer of information, (d) cases in which the information has been used for the prevention, investigation, detection, or prosecution of terrorism or its financing, and (e) compliance with data protection obligations specified in this Agreement. The review shall include a representative and random sample of searches in order to verify compliance with the safeguards and controls set out in this Agreement, as well as a proportionality assessment of the Provided Data, based on the value of such data for the investigation, prevention, detection, or prosecution of terrorism or its financing. Following the review, the European Commission will present a report to the European Parliament and the Council on the functioning of this Agreement, including the areas mentioned in this paragraph.

3. For the purposes of the review, the European Union shall be represented by the European Commission, and the United States shall be represented by the U.S. Treasury Department. Each Party may include in its delegation for the review experts in security and data protection, as well as a person with judicial experience. The European Union review delegation shall include representatives of two data protection authorities, at least one of which shall be from a Member State where a Designated Provider is based.

4. For the purposes of the review, the U.S. Treasury Department shall ensure access to relevant documentation, systems, and personnel. The Parties shall jointly determine the modalities of the review.

Article 14

Transparency — providing information to the data subjects

The U.S. Treasury Department shall post on its public website detailed information concerning the TFTP and its purposes, including contact information for persons with questions. In addition, it shall post information about the procedures available for the exercise of the rights described in Articles 15 and 16, including the availability of administrative and judicial redress as appropriate in the United States regarding the processing of personal data received pursuant to this Agreement.

Article 15

Right of access

1. Any person has the right to obtain, following requests made at reasonable intervals, without constraint and without excessive delay, at least a confirmation transmitted through his or her data protection authority in the European Union as to whether that person's data protection rights have been respected in compliance with this Agreement, after all necessary verifications have taken place, and, in particular, whether any processing of that person's personal data has taken place in breach of this Agreement.

2. Disclosure to a person of his or her personal data processed under this Agreement may be subject to reasonable legal limitations applicable under national law to safeguard the prevention, detection, investigation, or prosecution of criminal offences, and to protect public or national security, with due regard for the legitimate interest of the person concerned.

3. Pursuant to paragraph 1, a person shall send a request to his or her European national supervisory authority, which shall transmit the request to the Privacy Officer of the U.S. Treasury Department, who shall make all necessary verifications pursuant to the request. The Privacy Officer of the U.S. Treasury Department shall without undue delay inform the relevant European national supervisory authority whether personal data may be disclosed to the data subject and whether the data subject's rights have been duly respected. In the case that access to personal data is refused or restricted pursuant to the limitations referred to in paragraph 2, such refusal or restriction shall be explained in writing and provide information on the means available for seeking administrative and judicial redress in the United States.

Article 16

Right to rectification, erasure, or blocking

1. Any person has the right to seek the rectification, erasure, or blocking of his or her personal data processed by the U.S. Treasury Department pursuant to this Agreement where the data are inaccurate or the processing contravenes this Agreement.

2. Any person exercising the right expressed in paragraph 1 shall send a request to his or her relevant European national supervisory authority, which shall transmit the request to the Privacy Officer of the U.S. Treasury Department. Any request to obtain rectification, erasure, or blocking shall be duly substantiated. The Privacy Officer of the U.S. Treasury Department shall make all necessary verifications pursuant to the request and shall without undue delay inform the relevant European national supervisory authority whether personal data have been rectified, erased, or blocked, and whether the data subject's rights have been duly respected. Such notification shall be explained in writing and provide information on the means available for seeking administrative and judicial redress in the United States.

Article 17

Maintaining the accuracy of information

1. Where a Party becomes aware that data received or transmitted pursuant to this Agreement are not accurate, it shall take all appropriate measures to prevent and discontinue erroneous reliance on such data, which may include supplementation, deletion, or correction of such data.

2. Each Party shall, where feasible, notify the other if it becomes aware that material information it has transmitted to or received from the other Party under this Agreement is inaccurate or unreliable.

Article 18

Redress

1. The Parties shall take all reasonable steps to ensure that the U.S. Treasury Department and any relevant Member State promptly inform one another, and consult with one another and the

Parties, if necessary, where they consider that personal data have been processed in breach of this Agreement.

2. Any person who considers his or her personal data to have been processed in breach of this Agreement is entitled to seek effective administrative and judicial redress in accordance with the laws of the European Union, its Member States, and the United States, respectively. For this purpose and as regards data transferred to the United States pursuant to this Agreement, the U.S. Treasury Department shall treat all persons equally in the application of its administrative process, regardless of nationality or country of residence. All persons, regardless of nationality or country of residence, shall have available under U.S. law a process for seeking judicial redress from an adverse administrative action.

Article 19

Consultation

1. The Parties shall, as appropriate, consult each other to enable the most effective use to be made of this Agreement, including to facilitate the resolution of any dispute regarding the interpretation or application of this Agreement.

2. The Parties shall take measures to avoid the imposition of extraordinary burdens on one another through application of this Agreement. Where extraordinary burdens nonetheless result, the Parties shall immediately consult with a view to facilitating the application of this Agreement, including the taking of such measures as may be required to reduce pending and future burdens.

3. The Parties shall immediately consult in the event that any third party, including an authority of another country, challenges or asserts a legal claim with respect to any aspect of the effect or implementation of this Agreement.

Article 20

Implementation and non-derogation

1. This Agreement shall not create or confer any right or benefit on any person or entity, private or public. Each Party shall ensure that the provisions of this Agreement are properly implemented.

2. Nothing in this Agreement shall derogate from existing obligations of the United States and Member States under the Agreement on Mutual Legal Assistance between the European Union and the United States of America of 25 June 2003 and the related bilateral mutual legal assistance instruments between the United States and Member States.

Article 21

Suspension or termination

1. Either Party may suspend the application of this Agreement with immediate effect, in the event of breach of the other Party's obligations under this Agreement, by notification through diplomatic channels.

2. Either Party may terminate this Agreement at any time by notification through diplomatic channels. Termination shall take effect six (6) months from the date of receipt of such notification.

3. The Parties shall consult prior to any possible suspension or termination in a manner which allows a sufficient time for reaching a mutually agreeable resolution.

4. Notwithstanding any suspension or termination of this Agreement, all data obtained by the U.S. Treasury Department under the terms of this Agreement shall continue to be processed in accordance with the safeguards of this Agreement, including the provisions on deletion of data.

Article 22

Territorial application

1. Subject to paragraphs 2 to 4, this Agreement shall apply to the territory in which the Treaty on European Union and the Treaty on the Functioning of the European Union are applicable and to the territory of the United States.
2. This Agreement will only apply to Denmark, the United Kingdom, or Ireland if the European Commission notifies the United States in writing that Denmark, the United Kingdom, or Ireland has chosen to be bound by this Agreement.
3. If the European Commission notifies the United States before the entry into force of this Agreement that it will apply to Denmark, the United Kingdom, or Ireland, this Agreement shall apply to the territory of such State on the same day as for the other EU Member States bound by this Agreement.
4. If the European Commission notifies the United States after the entry into force of this Agreement that it applies to Denmark, the United Kingdom, or Ireland, this Agreement shall apply to the territory of such State on the first day of the month following receipt of the notification by the United States.

Article 23

Final provisions

1. This Agreement shall enter into force on the first day of the month after the date on which the Parties have exchanged notifications indicating that they have completed their internal procedures for this purpose.
2. Subject to Article 21, paragraph 2, this Agreement shall remain in force for a period of five (5) years from the date of its entry into force and shall automatically extend for subsequent periods of one (1) year unless one of the Parties notifies the other in writing through diplomatic channels, at least six (6) months in advance, of its intention not to extend this Agreement.

Done at Brussels, on 28 June 2010, in two originals, in the English language. This Agreement shall also be drawn up in the Bulgarian, Czech, Danish, Dutch, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish, and Swedish languages. Upon approval by both Parties, these language versions shall be considered equally authentic.